Supreme Court, U.S.
FILED

931280 FEB 4 1994

OFFICE OF THE CLERK

No. 94-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

NICHOLAS L. BIANCO, LOUIS R. FAILLA,
GAETANO J. MILANO and FRANK A. PUGLIANO,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDICES A-G

Wendy Hanna Sibbison
Counsel of Record
26 Beech Street
Greenfield, MA 01301
(413) 772-0329
Attorney for Gaetano J. Milano

Jeremiah Donovan
123 Elm Street
Old Saybrook, CT 06475
(203) 388-3750
Attorney for Louis R. Failla

Additional counsel on
inside cover.

February, 1994

203 pp

Vincent Bongiorni
101 State Street
Springfield, MA 01103
(413) 732-0222
Attorney for Frank A. Pugliano

William A. Dimitri
Dimitri & Dimitri
733 Douglas Avenue
Providence, RI 02908
(401) 273-5600
Attorney for Nicholas L. Bianco

QUESTIONS PRESENTED

1. Are the good faith exceptions to the Fourth Amendment's exclusionary rule applicable to Title III's statutory exclusionary rules, 18 U.S.C. §§ 2515, 2518(10)(a)?

2. Do the "roving bug" provisions of Title III, 18 U.S.C. §2518(11)(a), violate the particularity requirements of the Fourth Amendment?

3. May an affidavit which is not incorporated into and attached to a search warrant cure a fatal defect in that warrant?

4. May the government deprive defendants of standing by violating "non-central" provisions of Title III, and are Fourth Amendment limitations on standing applicable to Title III's standing requirements, 18 U.S.C. § 2510(11)?

TABLE OF CONTENTS[1]

QUESTIONS PRESENTED i

LIST OF ALL PARTIES. . . . . .iin

INDEX TO APPENDIX iv

TABLE OF AUTHORITIES v

PETITION 1

OPINIONS BELOW 1

JURISDICTION 3

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED . . . 4

STATEMENT OF THE CASE 8

Jurisdiction of court below . . 9

---

[1] **LIST OF ALL PARTIES**

The caption of the case in this court contains the names of all parties to this petition. Seven co-defendants, including the four Petitioners, appealed their convictions to the Second Circuit. Petitioners believe that Americo Petrillo, Louis Pugliano and Salvatore D'Aquila, Jr., no longer have an interest in the outcome of the proceeding in this Court.

REASONS FOR GRANTING THE WRIT 20

1. Whether courts may incorporate Fourth Amendment "good faith" exceptions into Title III's exclusionary rules presents a question on which the courts of appeals are in conflict; the Court of Appeals' decision here violated settled precedent of this court and constituted improper judicial legislation in an important area of law controlled by Congress. . . . 20

2. Whether the "roving bug" provisions of 18 U.S.C. §2518(11)(a) violate the Fourth Amendment is an important question of federal law which has not been but should be settled by this Court. 32

3. There exists among the courts of appeals a square and irreconcilable conflict concerning the question of whether an affidavit which is not incorporated into and attached to a search warrant can cure a fatal defect in that warrant. 43

4. Where, as here, the government's violations of Title III operated to deny Petitioners Bianco and Pugliano standing and where the Second Circuit has improperly equated Title III and Fourth Amendment standing requirements, this case presents an important question of federal law which should be decided by this Court. 52

CONCLUSION 63

INDEX TO APPENDIX

A. Opinion of the Court of Appeals A1-A88

B. Order Denying Petitioner Milano's Petition for Rehearing and Suggestion for Rehearing in Banc A88-90

C. Order Denying Petitioner Failla's Petition for Rehearing and Suggestion for Rehearing in Banc . A90-91

D. Order Denying Petitioner Bianco's Petition for Rehearing. . A92-93

E. Connecticut District Court's Memorandum and Order denying joint motion to suppress electronic surveillance ("roving bug"). . . A93-101

F. Electronic surveillance order ("roving bug") A101-115

G. Connecticut District Court's Memorandum and Order denying Petitioner Failla's motion to suppress electronic surveillance A115-129

Reproduced in a second volume filed with this Petition:

H. Massachusetts District Court's Memorandum and Order denying motion to suppress electronic surveillance ("roving bug") A130-399

TABLE OF AUTHORITIES

Cases

Andresen v. Maryland, 427 U.S. 463 (1976).....47

Application of Lafayette Academy, 610 F.2d 1 (1st Cir. 1979).....44

Boyd v. United States, 116 U.S. 616 (1886).....39

Chan v. State, 552 A.2d 1351 (Md.App. 1989).....22

City of Oakland by Kuhn v. City of Detroit, 610 F. Supp. 364 (D.Mich. 1984).....21

Coolidge v. New Hampshire, 403 U.S. 443 (1971).....23,38

Franks v. Delaware, 438 U.S. 154 (1978).....13, 17, 20, 24, 25, 27

Gelbart v. United States,
408 U.S. 41 (1972).....28
Johnson v. United States,
333 U.S. 10 (1948).....38, 39
Marbury v. Madison,
1 Cranch (5 U.S.) 137 (1803).....28
Marron v. United States,
275 U.S. 192 (1927).....39, 47
Massachusetts v. Sheppard,
468 U.S. 981 (1984).....29
Stanford v. Texas,
379 U.S. 476 (1965).....47
State v. Garcia,
547 So. 2d 628 (Fla. 1989)....22, 26
Steagald v. United States,
451 U.S. 204 (1981).....40, 41
United States v. Baranek,
903 F.2d 1068 (6th Cir.1990).....22, 22, 23, 26
United States v. Barker,
623 F. Supp. 823
(D.Colo. 1985).....21
United States v. Beaumont, 972 F.2d 553
(5th Cir. 1992).....44
United States v. Bellosi, 501 F.2d 833
(D.C.Cir. 1974).....59
United States v. Bianco, 998 F.2d 1112
(2nd Cir. 1993).....passim
United States v. Cantu, 625 F. Supp. 656
(N.D.Fla. 1985), aff'd,
791 F.2d 940 (11th Cir. 1986).....25
United States v. Chavez,
416 U.S. 562 (1974).....25
United States v. Crozier, 777 F.2d 1376
(9th Cir.1985).....44
United States v. Donovan,
429 U.S. 413 (1977)..25, 29, 56, 57, 59

United States v. Ferguson, 758 F.2d 843 (2nd Cir. 1985), cert. denied, 474 U.S. 841 (1985).....24
United States v. Ferrara, 771 F. Supp. 1266 (D. Mass. 1991).....passim
United States v. Giordano, 416 U.S. 505 (1974)..... 25, 54
United States v. Guerra-Marez, 928 F.2d 665 (5th Cir. 1991).....25
United States v. Harris, 903 F.2d 770 (10th Cir. 1990).....43
United States v. Haydel, 649 F.2d 1152 (5th Cir. 1981), cert. denied, 455 U.S. 1022 (1982).....44
United States v. Ippolito, 774 F.2d 1482 (9th Cir. 1985).....25
United States v. Jacobsen, 466 U.S. 109 (1984).....22
United States v. Johnson, 541 F.2d 1311 (8th Cir. 1976).....44
United States v. Karo, 468 U.S. 705 (1984).....39, 40
United States v. Klein, 565 F.2d 183 (1st Cir. 1977).....43
United States v. Leisure, 844 F.2d 1347 (8th Cir. 1988) cert. denied, 488 U.S. 932.....24
United States v. Leon, 468 U.S. 897 (1984)...13, 21, 27, 29
United States v. Marcello, 508 F. Supp. 586 (E.D.La. 1981), aff'd., 703 F.2d 805 (5th Cir.), cert. denied, 464 U.S. 935 (1983)..... 24
United States v. Mastroianni, 749 F.2d 900 (1st Cir. 1984).....24
United States v. McGuinness, 764 F. Supp. 888 (S.D.N.Y. 1991).....21
United States v. Ojeda Rios, 495 U.S. 257 (1990).....25

United States v. Orozco, 630 F. Supp. 1418 (S.D.Cal. 1986).....21
United States v. Petti, 973 F.2d 1441 (9th Cir. 1992), cert. denied, 113 U.S. 1859 (1993).....37
United States v Scafidi, 564 F.2d 633 (2d Cir. 1977), cert. denied, 436 U.S. 903 (1978).....37
United States v. Silberman, 732 F. Supp. 1057 (S.D.Cal. 1990).....37
United States v. Spadaccino, 800 F.2d 292 (2nd Cir. 1986).....21
United States v. Strand, 761 F.2d 449 (8th Cir. 1985).....44
United States v. Vastola, 670 F. Supp. 1244, 680 F. Supp. 709, 685 F. Supp. 917, 899 F.2d 211 (1990).....58
United States v. Vaughan, 830 F.2d 1185 (D.C.Cir. 1987).....43
United States v. Vest, 813 F.2d 477 (1st Cir. 1987).....22
United States v. Ward, 808 F. Supp. 803 (S.D.Ga. 1992).....21
United States v. Weinstein, 762 F.2d 1522 (11th Cir.), modified, 778 F.2d 673 (1985), cert. denied, 475 U.S. 1110 (1986).....43
United States v. Williams, 580 F.2d 578 (D.C.Cir. 1978).....53
United States v. Womack, 166 U.S. App. D.C. 35, 509 F.2d 368 (D.C.Cir. 1974), cert. denied, 422 U.S. 1022 (1975).....44
Welsh v. Wisconsin, 466 U.S. 740 (1984).....40

CONSTITUTION AND STATUTES

U.S. Const., amend. IV.....passim
418 U.S.C. § 1343.....15
18 U.S.C. § 1959.....15
18 U.S.C. § 1962(d).....15
18 U.S.C. § 2510(11).....1, 18, 52
18 U.S.C. § 2515 .....1, 5, 28
18 U.S.C. § 2518(1)(e).....12
18 U.S.C. § 2518(10)(a).....1, 5, 18, 28
18 U.S.C. § 2518(11)(a)(ii) 1, 5, 12 24, 29, 32, 35, 37, 42, 52, 55, 61, 62
18 U.S.C. § 2520(d).....27
18 U.S.C. § 3231.....9
28 U.S.C. § 1254(1).....3

MISCELLANEOUS

114 Cong. Rec. § 12508 (1968).....60
H.R. Rep. No. 647, 99th Cong., 2d Sess., (1986).....32
James G. Carr, The Law of Electronic Surveillance (1993).....24
Clifford S. Fishman, Wiretapping and Eavesdropping (Supp. 1993).....23
Clifford S. Fishman, "Interception of Communications in Exigent Circumstances: The Fourth Amendment, Federal Legislation, and the United States Department of Justice," 22 Ga. L. Rev. 65 (1987).....33
Goldsmith, "Eavesdropping Reform: The Legality of Roving Surveillance," 1987 Univ. Ill. L. Rev. 401 (1987) 33, 34
Sutherland Statutory Construction, (5th ed. 1992).....28

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NICHOLAS L. BIANCO, LOUIS R. FAILLA, GAETANO J. MILANO AND FRANK A. PUGLIANO respectfully petition this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit upholding petitioners' convictions for racketeering and related offenses.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is published as United States v. Bianco, 998 F.2d 1112 (2nd Cir. 1993). It is Appendix A to this petition. The orders of the court of appeals denying Mr. Milano's and Mr. Failla's petitions for panel rehearing and for rehearing in banc are Appendices B and C. The order

denying Mr. Bianco's petition for rehearing is Appendix D. The memorandum and order of the Connecticut District Court judge, denying petitioners' joint motions to suppress electronic surveillance on the "roving bug" issue, and the order authorizing the surveillance, are Appendices E and F. The memorandum and order of the Connecticut District Court judge, denying Petitioner Failla's separate motion to suppress based on the search of his home, is Appendix G. The memorandum and order of a Massachusetts District Court judge in a related case, incorporated into the Connecticut judge's "roving bug" rulings here, is published as United States v. Ferrara, 771 F. Supp. 1266 (D. Mass. 1991) and is reproduced in a separate volume as Appendix H.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit affirming petitioners' convictions for racketeering offenses was entered on July 19, 1993. The Court of Appeals' Orders denying Mr. Milano's and Mr. Failla's petitions for rehearing were entered on September 20, 1993. Its Order denying Mr. Bianco's petition for rehearing was entered on October 7, 1993. By Order dated December 8, 1993, under Docket No. A-465, Justice Thomas granted petitioners' timely filed application for an extension of time within which to file this petition for writ of certiorari, to and including February 4, 1994.

Petitioner invokes this court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. 90-351, codified at 18 U.S.C. §§ 2510-2521, as amended by Pub. L. No. 99-508 (1986), provides, in pertinent part:

§ 2510. Definitions.

(11) "aggrieved person" means a person who was a party to any intercepted ... oral ... communication or a person

against whom the interception was directed ....

§ 2515. Prohibition on use as evidence of intercepted. . . oral communications.

Whenever any ... oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial ... in or before any court of the United States ... if the disclosure of that information would be in violation of this chapter.

§ 2518. Procedure for interception of ... oral communications.

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * *

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including . . . (ii) except as provided in subsection (11), a particular description of the nature

and location of the facilities from which or the place where the communication is to be intercepted ...

* * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that--

* * *

(d) except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

* * *

(10)(a) Any aggrieved person in any trial ... before any court ... of the United States ... may move to suppress

the contents of any ... oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that--

(i) the communication was unlawfully intercepted ... .

* * *

(11) The requirements of subsections (1)(b)(ii) and (3)(d) of this section relating to the specification of the facilities from which, or the place where, the communication is to be intercepted do not apply if --

(a) in the case of an application with respect to the interception of an oral communication --

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted; and

(iii) the judge finds that such specification is not practical; and

(b) in the case of an application with respect to a wire or electronic communication --

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicants makes a showing of a purpose, on the part of that person, to thwart interception by changing facilities; and

(iii) the judge finds that such purpose has been adequately shown.

STATEMENT OF THE CASE

The opinions below contain all the facts and rulings relevant to the issues presented in this petition. A1-A88, A93-A101, A115-129, A130-399. We summarize those facts and rulings here.

This petition arises from a racketeering case which focused on the activities of the Patriarca family of La Cosa Nostra (LCN). By superceding indictment returned on December 7, 1990, in the United States District Court for the District of Connecticut, Petitioners and seven other individuals were charged with various racketeering offenses based on their LCN association. The district court's jurisdiction was properly invoked under 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses.

A simultaneous prosecution proceeded against other defendants on similar grounds in the United States District Court for the District of Massachusetts.

A principal pre-trial issue in both prosecutions was the admissibility of a

tape recording of an LCN induction ceremony in Medford, Massachusetts, on October 29, 1989. That recording had been obtained through a "roving bug" warrant, authorized by a 1986 amendment of Title III and permitting the government--under limited circumstances--to obtain an electronic surveillance warrant without specifying the place or time when interceptions would occur.

The "roving bug" warrant issued here targeted the communications of three of the Massachusetts defendants--Russo, Ferrara and Carrozza--and named additional persons, including all four of the present Petitioners, as targets of the overall investigation. A102-A105. The recording of the ceremony captured the voices of Petitioners Milano and Failla but not those of Bianco or Pugliano.

Motions to suppress the recording were filed in both Massachusetts and Connecticut cases.

On April 15, 1991, the Massachusetts District Court, after evidentiary hearings, found the "roving bug" provision of Title III constitutional. A197-A275, 771 F.Supp. at 1281-1296.

The District Court further found that the government had broken the law in applying for the "roving bug" warrant here in two respects: (1) it failed to disclose facts showing "that it had probable cause to believe that the conversations it wanted to intercept would occur on a particular date, October 29, 1989, and at a particular location, 34 Guild Street," in violation of the "full and complete statement" requirement

of 18 U.S.C. § 2518(11)(a)(ii);[2] and (2) it failed to disclose prior Title III applications for surveillance of Petitioners Milano and Bianco, in violation of 18 U.S.C. § 2518(1)(e). A132-A188, A369-A377; 771 F.Supp. at 1270-1280, 1314-1315.

Because of these disclosure violations, the District Court ruled:

> The roving intercept provisions of Title III, and their constitutionality, rely in meaningful measure on an independent judicial officer, rather than a law enforcement officer engaged in the competitive business of combatting crime, deciding that it is reasonable, necessary, and appropriate to relax the usual particularity requirements of the statute. [Citation omitted.] The court in this case did

---

[2]The government continued to withhold this information--which showed that it had had probable cause to obtain an ordinary Title III warrant--from the court and the defense until well into the suppression hearings. The District Court found the government's continuing "lack of candor ... disturbing." A335-A336, 771 F.Supp. at 1308.

not have an opportunity to make the fully informed decision on this issue which § 2518(11)(a) contemplates. A332; 771 F.Supp. at 1307, emphasis added.

The Massachusetts District Court nonetheless ruled the tapes admissible by grafting onto Title III's statutory exclusionary rules the "good faith" exceptions to the Fourth Amendment exclusionary rule announced in Franks v. Delaware, 438 U.S. 154 (1978) and United States v. Leon 468 U.S. 897 (1984). 771 F.Supp. 1304-1305, A317-A318.

On April 19, 1991, the Connecticut District Court ruled the tapes admissible in the Connecticut cases, adopting the Massachusetts judge's findings of fact and conclusions of law. A93-A101.

A separate pre-trial issue, relevant to Petitioner Failla alone, concerned federal agents' search of his residence.

Failla moved to suppress all items seized during the course of that search on the grounds that the warrant authorizing the search failed to describe the property to be seized with sufficient particularity. After a hearing, the District Court denied the motion, finding the requisite particularity in the description of the items to be seized. A115-A129.

Petitioners' jury trial began on April 17, 1991, and ended with verdicts on August 8, 1991. The government's central proof of the existence of the racketeering enterprise--the Patriarca family of La Cosa Nostra--was its tape recording of the LCN induction ceremony. Further, statements made by Petitioners Milano and Failla at the event were played for the jury and offered to prove specific racketeering acts charged in the

indictment. A number of items seized from the Failla residence were also introduced.

All petitioners were convicted of belonging to a RICO conspiracy in violation of 18 U.S.C. § 1962(d) and of related RICO substantive charges under 18 U.S.C. § 1962(c). Petitioners Milano and Failla were each convicted of one substantive violation of 18 U.S.C. § 1959, prohibiting violent crimes in aid of racketeering, and Petitioners Milano and Pugliano were also convicted of conspiracy to commit this offense. Pugliano and Failla were convicted of wire fraud in violation of 18 U.S.C. § 1343.

After sentencing on November 26, 1991, all Petitioners claimed a timely appeal. By opinion dated July 19, 1993,

the Second Circuit affirmed Petitioners' convictions.

Addressing the constitutionality of the roving bug statute, both on its face and as applied here, the Second Circuit acknowledged that a literal reading of the Fourth Amendment would forbid the warrant issued here, which failed to particularize the time and place for the search; but it then rejected "the narrow shackles that might otherwise flow from a literal reading of the Fourth Amendment." Instead, the court held this provision of Title III constitutional under a "relaxed particularity standard" appropriate for organized crime members who attempt to thwart surveillance. Relying on the statute's several protections against governmental abuse of the "roving bug" and on the "grave law enforcement

purposes underlying § 2518," the court concluded that the "roving bug" provision permits "no greater invasion of privacy than is necessary." A53-A65; 998 F.2d at 1120-1124.

Addressing whether the tapes should have been suppressed because of the government's violations of Title III, the Second Circuit held that Title III's statutory exclusionary rules, like the Fourth Amendment, are not to be read literally. Instead, they should be construed to include the judicially-crafted Franks exception, permitting evidence obtained in violation of Title III's disclosure provisions to be used at trial where the violations were not made "knowingly and intentionally, or with reckless disregard for the truth." A65-A76; 998 F.2d at 1124-1126.

While agreeing that Petitioners Milano and Failla had standing to challenge the tapes under Title III, since their voices were among those captured, the Second Circuit did not quote or discuss the statutory language relied upon by Pugliano and Bianco, which confers standing on "any. . .person against whom the interception was directed." 18 U.S.C. §§ 2510(11), 2518(10)(a). Pugliano and Bianco had argued that since they were named in the government's "roving bug" application as persons about whom the government hoped to obtain evidence, the express language of Title III conferred standing on them. The Second Circuit ruled that statutory standing under Title III is synonymous with judge-made rules of standing under

the Fourth Amendment. A49-A52; 998 F.2d at 1122.

On the search of Failla's home, the Court of Appeals agreed that the descriptions of the items to be seized in the warrant itself were fatally overbroad. A8-A18; 998 F.2d at 1115-1116. It held, however, that this defect in the warrant could be cured by the affidavit supporting the warrant, even though that affidavit was not incorporated into or attached to the warrant. A18-A22; 998 F.2d at 1116-1117.

REASONS FOR GRANTING THE WRIT

1. Whether courts may incorporate Fourth Amendment "good faith" exceptions into Title III's exclusionary rules presents a question on which the courts of appeals are in conflict; the Court of Appeals' decision here violated settled precedent of this court and constituted improper judicial legislation in an important area of law controlled by Congress.

The courts of appeals are in conflict on whether a judicially-crafted good faith exception, derived from Fourth Amendment jurisprudence, can be applied to Title III's statutory exclusionary rules.

Here, without any inquiry into whether Congress intended such an exception, the Second Circuit affirmed the District Court's adoption of "the good faith prong of the Franks test" as an exception to Title III's exclusionary rules. A69-A72, A311-A319. Yet several years earlier, a different panel of the

same court refused to incorporate the Fourth Amendment good faith exception announced in United States v. Leon, 468 U.S. 897 (1984) into a state wiretap statute, after careful statutory construction. United States v. Spadaccino, 800 F.2d 292, 296 (2nd Cir. 1986).[3]

---

[3]The Second Circuit here did not address the applicability of the Fourth Amendment good faith exception announced in United States v. Leon, 468 U.S. 897 (1984) to Title III's exclusionary rules. The District Court below found Leon applicable, A276-A284,

Other District Courts have sharply disagreed, further demonstrating the lack of coherence on this important issue throughout the federal system. United States v. Ward, 808 F.Supp. 803, 807-808 (S.D.Ga. 1992); United States v. McGuinness, 764 F.Supp. 888, 897, n.2 (S.D.N.Y. 1991); United States v. Orozco, 630 F.Supp. 1418, 1521-22 (S.D.Cal. 1986); City of Oakland by Kuhn v. City of Detroit, 610 F.Supp. 364, 369, n.10 (D.Mich. 1984).

(continued...)

In conflict with the Second Circuit's ruling here, the First Circuit refused to incorporate into Title III's exclusionary rules an analogous good faith exception derived from Fourth Amendment law: the "innocent recipient" exception set forth in United States v. Jacobsen, 466 U.S. 109, 113-118 (1984). United States v. Vest, 813 F.2d 477, 481-482 (1st Cir. 1987).

The application of another analogous Fourth Amendment exception to Title III's exclusionary rules resulted in a split decision in the Sixth Circuit. In United

---

[3](...continued)
Several state courts have refused to apply Fourth Amendment good faith exceptions to state statutory exclusionary rules. State v. Garcia, 547 So.2d 628, 629 (Fla. 1989); Chan v. State, 552 A.2nd 1351, 1360 (Md.App. 1989) (dictum). See also, Id. at 1358 (dictum: Title III exclusionary rule "invulnerable to good faith exception").

States v. Baranek, 903 F.2d 1068 (6th Cir. 1990), a majority of the panel incorporated a good faith "plain hearing" exception into Title III, based on a novel permutation of Coolidge v. New Hampshire, 403 U.S. 443 (1971). Citing "the usual Fourth Amendment calculus," the majority ruled that Title III did not require suppression where violations of a wiretap order were "inadvertant" and committed by "government agents ... charged with no wrongdoing." 903 F.2d at 1071-1072. The dissenting justice disagreed, urging strict construction of Title III's exclusionary rule. Id. at 1072-1073 (Jones, J., dissenting).

The commentators, too, sharply disagree on whether Title III's exclusionary rules include a good faith exception. Clifford S. Fishman, Wiretap-

ping and Eavesdropping § 253 (Supp. 1993) (good faith inapplicable); James G. Carr, The Law of Electronic Surveillance, § 6.3A (1993) (good faith applicable).

The proper approach is not to read any judge-made good faith exception, grounded in Fourth Amendment law, into Title III.[4] As this Court has

---

[4]In most other cases applying Franks to suppression motions, unlike here, the defendants appear to have mounted Fourth Amendment challenges to probable cause, without any separate reliance on Title III's exclusionary rules. All parties thus agreed on a Franks approach. See, e.g., United States v. Leisure, 844 F.2d 1347, 1357-1358 (8th Cir. 1988) cert. denied, 488 U.S. 932; United States v. Ferguson, 758 F.2d 843, 848 (2nd Cir. 1985), cert. denied, 474 U.S. 841 (1985); United States v. Mastroianni, 749 F.2d 900, 909 (1st Cir. 1984); United States v. Marcello, 508 F. Supp. 586, 603-607 (E.D.La. 1981), aff'd. 703 F.2d 805 (5th Cir.), cert. denied, 464 U.S. 935 (1983).

In two cases where courts did apply Franks to strictly statutory issues--Title III's necessity requirement, 18 U.S.C. §§ 2518(1)(c) and (3)(c)--good faith was not in issue: the question was

(continued...)

explicitly directed:

> [T]he availability of the suppression remedies for these statutory, as opposed to constitutional violations ... turns on the provisions of Title III rather than the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights. United States v. Donovan, 429 U.S. 413, 433 n.22 (1977); accord, United States v. Chavez, 416 U.S. 562 (1974); United States v. Giordano, 416 U.S. 505 (1974); cf. United States v. Ojeda Rios, 495 U.S. 257 (1990). Emphasis added.

---

[4](...continued)
whether bad faith misrepresentations or omissions were "material," a test also applied here, we assert, without Congressional authorization. A345-A354. Those circuits were in conflict on the nature of the "materiality" test, with the Fifth Circuit disapproving what it called the Ninth's Circuit's "diluted Franks standard." United States v. Guerra-Marez, 928 F.2d 665, 670 n.4 (5th Cir. 1991); United States v. Ippolito, 774 F.2d 1482, 1484-1487 (9th Cir. 1985). See also, United States v. Cantu, 625 F.Supp. 656, 663-664 (N.D.Fla. 1985), aff'd, 791 F.2d 940 (11th Cir. 1986) (defendant challenging veracity of wiretap affidavit on any statutory requirement must comply with Franks to obtain evidentiary hearing).

The Second Circuit's decision here (and that of the majority in United States v. Baranek, 903 F.2d 1068 [6th Cir. 1990]) flatly violates this directive, which is necessary to preserve the proper separation of powers between Congress and the judiciary.[5]

There can be no question that, in setting forth various good faith exceptions to the Fourth Amendment exclusionary rule, this Court exercised its proper role in defining and refining constitutional jurisprudence. There can also be no question that Congress exercised its proper role in setting its

---

[5]The Florida Supreme Court, ruling Fourth Amendment good faith exceptions inapplicable to the state wiretap statute's exclusionary rule, certified the issue as a "question of great public importance." State v. Garcia, 547 So.2d 628, 629 (Fla. 1989).

own standards for suppressing evidence where the wiretap statute is violated.

The necessary inquiry here, which the Second Circuit failed to conduct, A72-A75, was to determine Congressional intent. There is no evidence that Congress ever intended any good faith exception to Title III's exclusionary rules and substantial evidence to the contrary. In 1986--after both Leon and Franks had narrowed the Fourth Amendment exclusionary rule--Congress amended 18 U.S.C. § 2520(d) of Title III[6] and expressly provided for a good faith defense "against any civil or criminal action brought under this chapter or any other law." 18 U.S.C. § 2520(d). By contrast, Congress did not enact any new

---

[6]P.L. 99-508, Title I, § 103, 100 Stat. 1854 (1986).

good faith exception to Title III's exclusionary rules, 18 U.S.C. §§ 2515, 2518(10)(a). The principle of expressio unius est exclusio alterius thus compels the conclusion that Congress did not authorize the courts to apply such an exception. Sutherland Statutory Construction, § 47.23 (5th ed. 1992). Marbury v. Madison, 1 Cranch (5 U.S.) 137, 174 (1803).

This Court has recognized that Congress had dual purposes in mind in drafting Title III's exclusionary rule: "not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct." Gelbart v. United States, 408 U.S. 41, 51 (1972). These are broader than the deterrent purpose of the Fourth Amendment exclusionary rule

emphasized in recent years by this Court.[7]

Here, both the District Court and the Second Circuit agreed that the government engaged in illegal conduct, by withholding relevant information from the issuing judge in violation of a central provision of Title III, 18 U.S.C. § 2518(11)(a)(ii) and of a second important disclosure provision, 18 U.S.C. § 2518(1)(e). A149-A157, A188-A189, A330-A333, A369-A370; A36-A40, A68-A72, A83. Under these circumstances, this court has squarely held that Congress' bright-line exclusionary rules required suppression. United States v. Donovan, 429 U.S. 413, 437 (1977).

---

[7]See, e.g, United States v. Leon, 468 U.S. 897, 906 (1984); Massachusetts v. Sheppard, 468 U.S. 981 (1984).

Moreover, this case concerns illegal conduct by the government in a particularly sensitive area of the law: an application for a warrant which specifies no particular place or time for its execution. Assuming arguendo that Title III's "roving bug" provision is not unconstitutional (see question 2 below), it nonetheless comes dangerously close to authorizing a general warrant, giving the executive branch unprecedented discretion to install a multitude of listening devices in a multitude of places.[8] If law enforcement officers are to have such

---

[8]The District Court noted the broad discretion granted the government here: "once the roving intercept order was issued, there was no express limitation on the number of places in which the government could install listening devices based upon executive, rather than judicial, branch decisions that there was a proper basis to do so." A259, 771 F. Supp. at 1293, emphasis added.

a powerful tool, which skates close to the thin ice of unconstitutionality, then the statutory pre-conditions must be enforced with the utmost rigor.

The line separating the statutory exclusionary rules controlled by Congress from the judicially-crafted Fourth Amendment exclusionary rule, a paradigm for the core principle of separation of powers, must remain inviolate. Certiorari is thus necessary to preserve the separate integrity of the courts and Congress, to correct improper judicial lawmaking, and to foster a unified system of law throughout the federal courts on an important federal question.

2. Whether the "roving bug" provisions of 18 U.S.C. §2518(11)(a) violate the Fourth Amendment is an important question of federal law which has not been but should be settled by this Court.

In 1986, Congress enacted a comprehensive eavesdropping reform provision designed to accommodate existing law to developing technologies. In the Electronic Communications Privacy Act of 1986,[9] Congress conferred additional protections upon persons utilizing new technologies such as electronic mail, computer transmissions, video teleconferencing, cellular telephones, some electronic pagers, and certain types of radio transmissions.[10] While the amended statute provided

---

[9] Pub. L. No. 99-508, 100 Stat. 1848 (1986).

[10] H.R. Rep. No. 647, 99th Cong., 2d Sess., at 31-39 (1986) [hereinafter H.R. Rep. No. 647].

increased protection for certain privacy interests, it also authorized a novel law enforcement practice breathtakingly Orwellian[11] in its scope: the roving interception of conversations at an unlimited number of unspecified locations

---

[11] Each of the commentators who has written about roving surveillance has been reminded of George Orwell. See, Fishman, "Interception of Communications in Exigent Circumstances: The Fourth Amendment, Federal Legislation, and the United States Department of Justice," 22 Ga.L.Rev. 65 (1987) ("There is something more than faintly Orwellian, of course, about the prospect that law enforcement officials can bug any number of hotel rooms, offices, or homes, all on the chance that a suspect might at some point during the authorized interception period choose to discuss his past, present, or future crimes in one of them"); Goldsmith, "Eavesdropping Reform: The Legality of Roving Surveillance," 1987 Univ. Ill. L. Rev. 401, 403 (1987) ("In a more isolated setting, a roving surveillance proposal would have been perceived and rejected as Orwellian. Instead, congressional desire to conform Title III to a host of new technologies provided an ideal context for modifying the specificity requirement.")

without the requirement of a warrant particularizing the place of the anticipated communication.

Despite the unprecedented scope of a provision that permits agents to make unwarranted entries into any number of locations in order to plant listening devices, Congress devoted almost no attention to the consequences of roving bugs. "The issue is barely mentioned in a legislative record encompassing four years of debate. Apparently, congressional attention was so focused on the broader questions of technological privacy, that the implications of roving surveillance were relatively unnoticed."[12]

---

[12] Goldsmith, "Eavesdropping Reform," supra, at 403 n.6. Professor Goldsmith sets forth the very sparse legislative history of the roving surveillance provisions.

Prior to the adoption of the roving intercept amendment, Title III required that an application for an interception order contain "a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted." 18 U.S.C. §2518(1)(b)(ii). Before issuing a traditional interception order, a judge is required to find that there is probable cause to believe that the facilities or the place targeted for interception are being used, or are about to be used, in connection with the commission of the offenses specified in the application, or are leased to, listed in the name of, or commonly used by the individuals targeted in the application. 18 U.S.C. §2518(3)(d).

The roving intercept provision does away with these requirements: the place where the communication is to be intercepted does not need to be specified in the warrant, so long as the application contains a full and complete statement as to why such specification is not practical and a judge finds that such specification is indeed not practical. Ironically, in order to obtain authorization to make a surreptitious entry, a governmental agent must establish that there is no probable cause to make an entry into any particularized place.

Prior to this case, no federal court of appeals had passed upon the constitutionality of the roving bug amendments to Title III. One appellate court and one district court had found

constitutional the roving wiretap provisions of §2518(11)(b). United States v. Petti, 973 F.2d 1441 (9th Cir. 1992), cert. denied, 113 U.S. 1859 (1993); United States v. Silberman, 732 F.Supp. 1057 (S.D.Cal. 1990). Wiretaps, however, do not generally involve the unsupervised entry into private residences that is the most alarming feature of roving bugs. See United States v Scafidi, 564 F.2d 633, 645 (2d Cir. 1977) (Smith, J., dissenting) (referring to the dangers of surreptitious entries for the purpose of placing listening devices), cert. denied, 436 U.S. 903, 912 (1978).

Does a statute which leaves to the discretion of the investigative officer all decisions as to the locations and the number of places to be entered, the frequency of entry, and the time and

manner of entry satisfy the Fourth Amendment? Is the requirement of particularity satisfied by a provision that entrusts to a governmental agent all decisions as to which of the target's friends, lovers, associates, confessors, healers, confidants and relatives should have their residences entered surreptitiously and wired for governmental surveillance? Are decisions as to whose home should be bugged constitutionally entrusted to an "officer engaged in the often competitive enterprise of ferreting out crime"? Johnson v. United States, 333 U.S. 10, 14 (1948).

The general warrant, the unrestricted search, the roving commission have been condemned by Americans since Colonial days. Coolidge

v. New Hampshire, 403 U.S. 443, 467 (1964); Marron v. United States, 275 U.S. 192, 195 (1927); Boyd v. United States, 116 U.S. 616, 625 (1886). The Fourth Amendment forbids roving commissions of investigative officers by establishing the requirement of a warrant that particularly describes the place to be searched. "The primary reason for the warrant requirement is to interpose a 'neutral and detached magistrate' between the citizen and 'the officer engaged in the often competitive enterprise of ferreting out crime.'" United States v. Karo, 468 U.S. 705, 717 (1984); Johnson v. United States, 333 U.S. at 14.

The requirement of a warrant is especially important where the place to be entered, as here, is a private residence. "At the risk of belaboring

the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is one that society is prepared to recognize as reasonable." United States v. Karo, 468 U.S. at 714. "Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances." Id., Welsh v. Wisconsin, 466 U.S. 740, 748-49 (1984); Steagald v. United States, 451 U.S. 204, 211-12 (1981).

The Court of Appeals for the Second Circuit found the roving bug provision constitutional because it believed that the Fourth Amendment should not be applied literally, that this Court has favored "a flexible approach designed to

keep pace with a technologically advancing society," A54-A55, 998 F.2d at 1123, and that the "prohibition against 'unreasonable searches and seizures' must be interpreted 'in light of contemporary norms and conditions.'" Id., quoting Steagald v. United States, 451 U.S. 204, 217 n.10 (1981). Yet the only technological advancement involved in this case is the advancement in the electronic devices that are available to the Government for surreptitiously intercepting and transmitting conversations. The ceremony that was intercepted had its origins, as the panel noted, "hundreds of years ago," A34, 998 F.2d 1119, and there was nothing in the application for this interception warrant that reflected any "contemporary norms and conditions" that were different from

norms and conditions applying to organized crime from time immemorial.

The decision of the Court of Appeals, by eliminating the need for particularity in the place to be searched, weakens Fourth Amendment protections for our "technologically advanced society" at a time when such protections are needed more than ever. This question--whether the "roving bug" provisions of 18 U.S.C. § 2518(11)(a) violate the Fourth Amendment--is an important question of federal law which has not been but should be settled by this Court.

3. There exists among the courts of appeals a square and irreconcilable conflict concerning the question of whether an affidavit which is not incorporated into and attached to a search warrant can cure a fatal defect in that warrant.

The courts of appeals have generally recognized that where a warrant lacks particularity, the affidavit in support of the warrant can provide the requisite particularity--so long as the affidavit accompanies or is attached to the warrant and the warrant uses suitable words of reference which incorporate the affidavit. United States v. Harris, 903 F.2d 770, 775 (10th Cir. 1990); United States v. Vaughan, 830 F.2d 1185, 1186 (D.C.Cir. 1987) (per curiam); United States v. Weinstein, 762 F.2d 1522, 1531 (11th Cir.), modified, 778 F.2d 673 (1985), cert. denied, 475 U.S. 1110 (1986); United States v. Klein, 565 F.2d

183, 186 n. 3 (1st Cir. 1977); United States v. Johnson, 541 F.2d 1311, 1314-15 (8th Cir. 1976); United States v. Womack, 166 U.S.App.D.C. 35, 49, 509 F.2d 368, 382 (D.C.Cir. 1974), cert. denied, 422 U.S. 1022 (1975).

Prior to the decision below, however, every court of appeals that had considered the question had held that deficiencies in a warrant could not be remedied by an affidavit which was not incorporated into and attached to the deficient warrant. United States v. Beaumont, 972 F.2d 553, 560-63 (5th Cir. 1992); United States v. Crozier, 777 F.2d 1376, 1381 (9th Cir. 1985); United States v. Strand, 761 F.2d 449, 452-54 (8th Cir. 1985); Application of Lafayette Academy, 610 F.2d 1, 3-4 (1st Cir. 1979); United States v. Haydel, 649 F.2d 1152, 1156-57

(5th Cir. 1981), cert. denied, 455 U.S. 1022 (1982).

In the case below, the Court of Appeals for the Second Circuit departed from this previously universally recognized principle. The Court of Appeals properly found that a warrant authorizing the search of "[N]otes, Ledgers, Envelopes, Papers, and Records Containing Initials, Names, Addresses, Dollar Amounts, Codes, Figures, and the Like: United States Currency" was overbroad. A13-A18, 998 F.2d at 1115-1117. The Court of Appeals also recognized that the warrant did not incorporate the affidavit and that the affidavit was not physically attached to the warrant. A19, 998 F.2d at 1117.[13]

---

[13]The Court of Appeals also was under the mistaken view that the (continued...)

The Court of Appeals furthermore noted that other circuits had required that affidavits be incorporated and attached to the warrant before such affidavits would be held to cure deficiencies in the warrants that they support. Id. Nevertheless, the Court of Appeals held that the fatal overbreadth of this warrant could be cured by an affidavit which was neither incorporated into nor attached to the warrant. Id. So far as counsel can determine, the Second Circuit

---

[13](...continued)
affidavit was present at the site of the search. A21; 998 F.2d at 1117. There was no evidence that this was the case and the Government did not make this assertion either in the District Court or in its brief to the Court of Appeals. In fact, the affiant specifically requested that the affidavit be sealed so that the targets of his investigation would not be able to review it, Affidavit at 12, and the affidavit was sealed by the issuing court.

is the first and only circuit to have so held.

The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant. Marron v. United States, 275 U.S. 192, 196 (1927); accord, Andresen v. Maryland, 427 U.S. 463, 480 (1976); Stanford v. Texas, 379 U.S. 476 (1965). The dangers of the Second Circuit's holding, unique among the circuits, that lack of particularity in a warrant may be cured by an affidavit that is not incorporated into or attached to the warrant is well illustrated by this case.

The affidavit sought to establish that evidence of loan-sharking would be found in the Failla residence. The agent who acted as affiant did not himself participate in the search of the Failla residence. Among the large number of federal agents, local police officers, technicians and photographers who did conduct the search, only one, Special Agent Hutton, had read the affidavit. The searching agents knew what they were looking for, according to Agent Hutton, because "every one of these searching agents worked personally with me, in the same room with me--over the past year prior to that--were aware of what we were looking for." 2/19 Tr. 35. During that previous year, however, the agents had been involved in an investigation that was exponentially broader than the

limited investigation described in the affidavit, as the indictment and the trial indicate, and so it is not surprising that Agent Hutton himself believed that the search warrant authorized the seizure of items never even alluded to in the affidavit. Agent Hutton, the only searching agent who had read the affidavit, testified that he believed that the warrant permitted the seizure of documents linking the defendant to the murder of William Grasso, documents linking the defendant to the harboring of organized crime fugitives, documents linking the defendant to the disappearance of various organized crime figures--in short, any document that evidenced any mob activity whatsoever. 2/19 Tr. at 38-41. And it

was Agent Hutton who had "the final word o[n] what was seized." 2/19 Tr. at 59.

Nor is it surprising that the agents seized a large number of documents that were not within the scope of the search warrant even as that warrant was limited by the affidavit's description of the defendant's loan-sharking: keys, the defendant's passport, address books belonging to Failla's wife and daughter containing no name mentioned in the affidavit, a variety of different papers and articles including a newspaper article about the death of William Grasso that predated the activities described in the affidavit by several years. The searching agents testified that they believed that these items were within the scope of the warrant. 2/19 Tr. 67-68. Agent Hutton was well aware of the "plain

view" doctrine but he did not rely upon it to justify these seizures: he testified that he believed that each of these seizures, so clearly not encompassed within the affidavit, was authorized by the warrant. 2/19 Tr. 51.

Because the Second Circuit's departure from the holdings of other circuits creates a square and irreconcilable conflict among the circuits and because this departure, as illustrated by this case, severely undermines the particularity requirement of the Fourth Amendment, Petitioner Failla requests review of this question.

4. Where, as here, the government's violations of Title III operated to deny Petitioners Bianco and Pugliano standing and where the Second Circuit has improperly equated Title III and Fourth Amendment standing requirements, this case presents an important question of federal law which should be decided by this Court.

Title 18 U.S.C. Section 2510(11) defines "aggrieved person" as "a person who was a party to any intercepted wire, oral or electronic communication or a person against whom the interception was directed." A person who meets this definition may exercise his statutory right, pursuant to 18 U.S.C. § 2518 (10)(a), to move to suppress the contents of any wire or oral communication intercepted on the grounds, inter alia, that the communication was unlawfully intercepted. The language of Title III defining an "aggrieved person" for the purposes of invoking the statutory right

to move to suppress evidence thus requires an accused to show that the electronic interception was directed at him, or the government actually intercepted his conversations, or that the wiretapped communications occurred at least partly on his premises. United States v. Williams, 580 F.2d 578, 583 (D.C.Cir. 1978).

Standing for the purpose of a challenge to a Title III order is not as strictly limited as traditional concepts of Fourth Amendment case law. Title III provides a separate statutory mechanism for determining a defendant's legal standing to challenge the contents or derivative evidence of electronic surveillance offered by the government. As this court has held, the availability of Title III's suppression remedies

> does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III. United States V. Giordano, 416 U.S. 505, 524, (1974).

The inquiry turns then to a review of the attendant facts to determine whether the application and order reflect whether Petitioners Bianco and Pugliano were persons against whom the interception was "directed."

The application sought authorization to conduct roving electronic surveillance of Joseph Russo, Vincent Ferrara and Robert Carroza as principal targets of the roving intercept order. The application further stated and there was probable cause to believe Frank Pugliano and Nicolas Bianco, along with eight other named individuals, were also engaged in the listed offenses. The order permitted the government to direct

its surveillance efforts against any of those named parties provided their communication was "directed to and/or in the presence of" any of the named principal targets. A110.

The application did not disclose the fact that prior applications for other individuals named in the Application had been sought, including Petitioner Bianco, in violation of the disclosure provisions of 18 U.S.C. § 2518(1)(e). A373-A377; 771 F.Supp. at 1315. The District Court held, "Where the government had decided to name in its Application individuals believed to be co-conspirators of the proposed principal targets of an interception order, it had an obligation to inform the issuing judge of all prior requests to intercept conversations of those individuals." Id.

In United States V. Donovan, 429 U.S. 413 (1977), this Court rejected the government's effort to make a distinction between "principals" and other suspects in the context of the naming requirement of section 2518 (1)(b)(iv) of Title III. This conclusion is also appropriate with regard to the prior application disclosure requirement found violated here. A373-A377; 771 F. Supp. at 1314-1315.

In Donovan, supra, this Court stated that individuals must be named in the Application pursuant to section 2518 (1)(b)(iv) if the government has probable cause to believe a person was engaged in the criminal activity under investigation and was expected to be intercepted. The District Court here also held that it is

insufficient to identify only the principal target of a requested warrant if there are known individuals whose incriminating communications are expected to be intercepted. A376-A377. The court concluded that at the time the Application was signed by Judge Nelson the government had probable cause to believe it would soon intercept a Patriarca Family induction ceremony and the government had probable cause to believe that at least some of those named as co-conspirators in the Application in addition to the three principals would be intercepted. Id.

The court went to great lengths in Ferrara, in denying the motions to suppress, to minimize the government's errors with respect to the violations of section 2518(1)(e) and section 2518(1)

(b)(iv), and the Second Circuit adopted the Ferrara opinion in its entirety. A76-87. But what the District Court called the government's "innocent error" (A384) was tantamount to denying Petitioners Bianco and Pugliano standing under §§ 2510 (11) and 2518(10)(a). Because, as the District Court found, the government had probable cause to believe that some of the named co-conspirators in the Application in addition to the three principals would be intercepted, Petitioners Pugliano and Bianco should have been named in the Application. Thus, but for the defect in the government's application, the defendants would have had standing to challenge the 34 Guild Street interception. United States v. Vastola, 670 F. Supp. 1244 (1987), 680 F. Supp 709, (1988), 685 F.

Supp. 917 (1988), 899 F2d. 211 (1990) (defendants not named in application lacked standing). Additionally, standing has been conferred upon all persons overheard in a wiretap found to be illegal because the government failed to disclose that one person under investigation had been subject to previous wiretap authorization, and not just the person who was the subject of the prior authorization. United States v. Bellosi, 501 F.2d 833 (D.C.Cir. 1974).

By contrast with the facts in Donovan, supra, at 437, where the naming requirement of subsection (1)(b)(iv) was deemed not "to play a central, or even functional role in guarding against unwarranted use of wiretapping and electronic surveillance," Petitioners Bianco and Pugliano urge that, on the

facts surrounding this case, it played a highly central role: it deprived them of standing.

Senator Hart, in filing an amendment to section 2510 (11) which was not adopted by Congress, attempted to include within the definition of "aggrieved person" "any person against whom the communication or evidence derived therefrom is sought to be used." Senator Hart argued that Title III is likely to encourage illegal electronic surveillance of petty hoodlums by law enforcement officers to gain intelligence information against their bosses, secure in the knowledge that their illegal activities cannot be challenged in Court. 114 Cong. Rec. § 12508 (1968). Petitioners suggest that the "directed against" language of section 2510(11) may be a person's only

recourse when the government attempts to circumvent the requirements of section 2518(1)(b)(iv) in an order that clearly anticipates interception of parties other than principal targets and where the language of the order itself permits the government to direct electronic surveillance against all those parties. This, Petitioners contend, was the motivation of the government in failing to comply with prior application disclosure requirement of Section 2518 (10)(a) and the naming requirement of Section 2518(1)(b)(iv).

Based upon the facts of this case as set forth in Ferrara, A373-380, and adopted by the Second Circuit, A76-A87, Petitioners urge that the numerous violations in the application--of §§ 2518 (1)(e), 2518 (1)(b)(iv), 2518(11)(a)(ii)

and possibly § 2518 (1)(c)--when viewed cumulatively, cast serious doubt over the government's motivations. What the Court deemed to be the government's "inadvertent errors" in failing to comply with the requirements of Title III underscores the need to apply a flexible interpretation of the "directed against" language in defining standing, particularly against the background of the broadly worded roving surveillance order here.

Because the government's misconduct here, excused by the Second Circuit, deprived Petitioners of standing, because the Second Circuit disregarded the language of Title III and referred only to Fourth Amendment standing requirements, A49-A52, and because the scope of Title III's standing provisions

presents an important issue of federal law, certiorari should be granted.

CONCLUSION

For each of the foregoing reasons, Petitioners pray that this Court grant their petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit affirming their convictions.

Respectfully submitted,

Wendy Hanna Sibbison
Counsel of Record
26 Beech Street
Greenfield, MA 01301
(413) 772-0329
Attorney for Gaetano J. Milano

Jeremiah Donovan
123 Elm Street
Old Saybrook, CT 06475
(203) 388-3750
Attorney for Louis R. Failla

Vincent Bongiorni
101 State Street
Springfield, MA 01103
(413) 732-0222
Attorney for Frank A. Pugliano

William A. Dimitri
Dimitri & Dimitri
733 Douglas Avenue
Providence, RI 02908
(401) 273-5600
Attorney for Nicholas L. Bianco

APPENDIX A

UNITED STATES OF AMERICA, Appellee,
v.

NICHOLAS L. BIANCO, a/k/a Nicky; LOUIS R. FAILLA, a/k/a Louie; GAETANO J. MILANO, a/k/a Costello; AMERICO PETRILLO, a/k/a Rico, a/k/a Cigar; FRANK A. PUGLIANO, a/k/a Frankie Pugs; LOUIS PUGLIANO, a/k/a Louie Pugs; SALVATORE D'AQUILA, JR., a/k/a Butch, Defendants-Appellants,

RICHARD JOSEPH BEEDLE; JOHN F. CASTAGNA, a/k/a Sonny; FRANK COLANTONI; JOHN E. FARRELL, a/k/a Jack Sailorman, a/k/a Jack Fast; MATTHEW L. GUGLIEMETTI, JR., a/k/a Matty; JACK JOHNS, a/k/a Jackie, Defendants.

Nos. 91-1672, 91-1701, 91-1702, 91-1703, 91-1704, 91-1705, 91-1706

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

998 F.2d 1112

November 18, 1992, Argued
July 19, 1993, Decided

BEFORE: PRATT and ALTIMARI, Circuit Judges, and Gerald W. HEANEY, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appeals from judgments of conviction entered after a jury trial in the United

States District Court for the District of Connecticut, Alan H. Nevas, Judge. Defendants raise numerous arguments, including claims that 18 U.S.C. § 2518(11)(a), which authorizes a "roving bug" to intercept oral conversations without providing the issuing court with details as to the place of interception, is unconstitutional on its face and as applied in this case.

Affirmed.

ROBERT J. DEVLIN, JR., Assistant United States Attorney for the District of Connecticut (Albert S. Dabrowski, United States Attorney; John H. Durham, Chief, Criminal Division; Peter S. Jongbloed, Assistant United States Attorney, of Counsel), for Appellee.

WENDY SIBBISON, Greenfield, MA (Stephanie A. Levin and Holly Sobel Armitage, of Counsel), for Defendant Milano. BARRY M. FALLICK, New York, NY (Rochman Platzer Fallick Rosmarin & Sternheim, Bobbi C. Sternheim, of Counsel), for Defendant D'Aquila, Jr. JEREMIAH DONOVAN, Old Saybrook, CT, for Defendant Failla. RICHARD S. CRAMER, Wethersfield, CT, for Defendant Petrillo. WILLIAM A. DIMITRI, JR., Providence, RI (Dimitri & Dimitri; Edward J. Romano, of Counsel), for Defendant Bianco. VINCENT A. BONGIORNI, Springfield, MA, for Defendant Frank Pugliano. HARRY L. MANION, Boston, MA (Anthony Cardinale, Vincent A. Bongiorni, of Counsel), for Defendant Louis Pugliano.

PRATT, Circuit Judge:

Trial of this organized-crime racketeering case commenced on April 17, 1991, and continued for 45 days. All seven defendants were convicted of belonging to a RICO conspiracy in violation of 18 U.S.C. § 1962(d). Five of them were convicted of related RICO substantive charges under 18 U.S.C. § 1962(c). Five were convicted of either conspiracy or substantive violations of 18 U.S.C. § 1959, which prohibits violent crime in aid of racketeering. Two were convicted of wire fraud in violation of 18 U.S.C. § 1343. One was convicted of extortion in violation of 18 U.S.C. § 894(c). All defendants have appealed.

The RICO charges, the principal crimes at issue, focused on the organized-crime Patriarca family of La Cosa Nostra (LCN)

as the enterprise, which operated in New England over a period of many years under the leadership of Raymond L.S. Patriarca, who died in 1984 after designating his son, Raymond J. Patriarca, and William Grasso of New Haven, Connecticut, to head the enterprise.

The RICO charges were amply supported at trial by evidence that established not only the existence and history of the Patriarca family enterprise, but also each defendant's participation, or agreement to participate, in at least two of a long list of predicate acts of racketeering activity, including murder, drug trafficking, extortion, obstruction of justice, and gambling.

On appeal, defendants raise 42 different points and argue them in a total of 411 pages of briefing. They

challenge the indictment, the jury charge, the sentences, the makeup of the jury, numerous evidentiary and procedural rulings, and the sufficiency of the evidence. To all that, the government responds with two briefs totaling 270 pages.

We have carefully reviewed all of defendants' arguments in light of the record, briefs, and oral argument, and we find most of them to be so lacking in merit as to be unworthy of discussion. One of defendants' arguments -- their all-out attack against the "roving bug" tape recording of their LCN initiation ceremony -- requires extensive analysis. Two other arguments -- a claimed flaw in the makeup of the jury panel, and the admission of evidence obtained from a search of defendant Failla's private home

in East Hartford, Connecticut -- require brief comment. We will discuss first the latter two arguments, and then take up defendants' challenge to the government's "roving bug".

A. Jury Panel.

Defendant Milano is joined by his co-defendants in contending, for the first time on appeal, that the systematic, albeit inadvertent, exclusion of Blacks and Hispanics from the qualified jury wheel of the Hartford division of the District of Connecticut, between late 1989 and late August 1992, resulted in a violation of their sixth-amendment right to a fair trial. During this period, through an apparent computer-related error in processing names and addresses, the wheel included no citizens from the

division's principal cities, Hartford and New Britain, where two-thirds of its voting-age, minority population resides. Defendants argue that this denied them a fair cross-section of jurors in the community.

Defendants base their claim, in large measure, on Judge T.F. Gilroy Daly's order dated August 26, 1992, made in a separate case, where the same defective jury panel had been used. United States v. Osorio, 801 F. Supp. 966 (D. Conn. 1992) (inadvertent exclusion of residents of New Britain and Hartford communities from qualified jury wheel, resulting in exclusion of approximately two-thirds of Blacks and Hispanics in the division as source of names for grand jury selection, constituted systematic exclusion of those groups from jury-selection process and

gave rise to prima facie fair-cross-section violation).

Osorio may well be distinguishable, because it was based on a timely pretrial challenge to the juror-selection process, and it involved a grand jury, not a petit jury. We do not, however, address the merits of defendants' challenge to their jury panel on this direct appeal after conviction. The issue was [*1115] not presented to the district court; the record before us in this case provides an inadequate basis to resolve the issue. We therefore leave the issue to be pursued through whatever post-conviction remedies defendants may still have available to them.

B. Admission of Evidence Seized from Failla's Home.

Defendant Failla contends that the trial court erred in refusing to suppress

certain evidence that was seized during a search of his home. Failla specifically claims that the warrant authorizing the search was defective because it was not particular enough to limit the scope of the search. The government responds by arguing that (1) the descriptions used in the warrant at issue are more narrow than descriptions upheld in other cases; (2) even if the warrant was not particular enough, any ambiguity in the warrant is resolved by reference to the affidavit; and (3) even if we were not to rely on the supporting affidavit, we should uphold the search under the good-faith exception of United States v. Leon, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984).

1. Background Facts.

The district court issued a warrant to search Failla's home at 58 Cloverdale Drive, East Hartford, Connecticut, and a small shed outside the home in order to seize the following items:

> Notes, Ledgers, Envelopes, Papers, and Records Containing Initials, Names, Addresses, Dollar Amounts, Codes, Figures, and the Like: United States Currency.

No further limitation was made, nor was there any reference in the warrant itself to loansharking or any other crime. However, the supporting affidavit of special agent Richard T. Roberts set forth additional detail. It stated that the agents were looking for evidence of Failla's loansharking, described Failla's ongoing extortionate activities, and set forth portions of four conversations in which Failla stated that in his home he had records of his activities.

While the agents were executing their search of the house, they brought particular items they found to special agent William Hutton, who decided whether or not they should be seized. Hutton had familiarized himself with the warrant and its supporting affidavit, and was aware that he was looking for evidence of loansharking.

2. Challenge to the Breadth of the Warrant.

Failla moved in the district court to suppress any evidence seized during the course of the search on the ground that the warrant failed to particularly describe the property to be seized. This motion was denied after a hearing, and a number of the seized items were introduced during the trial.

The fourth amendment requires that warrants "particularly describe * * * the person or things to be seized." U.S. Const. amend. IV. The particularity requirement "makes general searches * * * impossible and prevents the seizure of one thing under a warrant describing another." Marron v. United States, 275 U.S. 192, 196, 72 L. Ed. 231, 48 S. Ct. 74 (1927). It prevents a "general, exploratory rummaging in a person's belongings." Coolidge v. New Hampshire, 403 U.S. 443, 467, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971).

The government points out that where agents have done all that could reasonably have been expected in drawing up a warrant, the inability to provide a more precise description of the criminal instruments to be found will not render

the warrant defective. See, e.g., United States v. Young, 745 F.2d 733, 759 (2d Cir. 1984) (courts tolerate greater degree of ambiguity where agents have done best they reasonably could under circumstances), cert. denied, 470 U.S. 1084 (1985); United States v. Dunloy, 584 F.2d 6, 8 (2d Cir. 1978) (warrant not impermissibly broad when officers were unable under circumstances to provide more precise description).

Those cases, however, do not help the government, for each involved a situation where the government was under emergency pressures that necessitated a broadly worded warrant. Significantly, there was no such emergency here. Moreover, along with the imprecise language in those cases, the warrants [*1116] included precise descriptions of some items to be

seized as well as specifications of the suspected crimes. See Young, 745 F.2d at 758 ("Quantities of heroin and other controlled substances, other chemical substances, equipment, utensils, paraphernalia, containers, money, notes, documents and papers and other evidence of a conspiracy to distribute and of the distribution * * * [of] controlled substance."); Dunloy, 584 F.2d at 8 (warrant to seize from safe deposit box "a quantity of cocaine, and additionally, all narcotic drug controlled substance, documents, records and other evidence of distribution and possession with intent to distribute narcotic drug controlled substances"). See also Andresen v. Maryland, 427 U.S. 463, 479, 49 L. Ed. 2d 627, 96 S. Ct. 2737 (1976) [**10] (upholding search where exhaustive list

of particularly described documents was coupled with open-ended nonparticular authorization). In this case, however, the warrant contained no particular description of items and made no mention of any criminal statute or criminal conduct.

The government's attempts to characterize other cases as supporting this high a level of ambiguity are easily distinguishable. The government states with misplaced confidence that "contrary to Failla's assertion * * *, the descriptions used in the warrant are more narrow then [sic] descriptions upheld in other cases." The government then points to United States v. Kepner, 843 F.2d 755, 757 (3d Cir. 1988), in which the court upheld a warrant that authorized seizure of "documents, records and personal

effects." In that case, though, the court found that the wording of the warrant was not overbroad, because the officers were searching for any proof that the defendant lived in the searched apartment. Id. In that situation, distinguishable from this case, anything with the defendant's name on it was evidence.

The other case the government points to in support of the broad wording of this warrant is United States v. Dennis, 625 F.2d 782, 792 (8th Cir. 1980) ("certain books and records relating to the extortionate credit transaction business"). Even in Dennis, however, the documents had to relate to the crime of extortion, a limitation that is lacking here. If anything, therefore, Dennis undercuts the government's claim.

We held in United States v. Buck, 813 F.2d 588, 590-92 (2d Cir.), cert. denied, 484 U.S. 857, 98 L. Ed. 2d 121, 108 S. Ct. 167 (1987), that a warrant authorizing officers to "seize any papers, things or property of any kind relating to previously described crime" was overly broad, because it "gave no limitation whatsoever on the kind of evidence sought", even though it did describe the crime under investigation. Here, however, the warrant, when viewed by itself, describes neither the precise items to be seized nor the possible crimes involved.

Based on current case law, and focusing solely on the warrant itself, we think that the warrant issued to search Failla's home was broader than we can accept. The fact that we have upheld

similarly broad provisions when they were coupled with more particular limiting language, or at least tied to particular crimes, tends to indicate that standing alone, the highly generalized provisions in this case are not supportable.

3. Reliance on the Affidavit.

The failure of the warrant to particularly describe the items to be seized does not render the warrant incurably defective. While this court has not yet held that ambiguity in a warrant may be resolved by reference to the affidavit submitted to obtain the warrant, other courts have done so in circumstances where the affidavit was incorporated by reference into the warrant and attached to the warrant. See, e.g., United States v. Harris, 903 F.2d

770, 775 (10th Cir. 1990); United States v. Vaughn, 265 U.S. App. D.C. 301, 830 F.2d 1185, 1186 (D.C. Cir. 1987) (per curiam); United States v. Weinstein, 762 F.2d 1522, 1531 (11th Cir.), modified, 778 F.2d 673 (1985), cert. denied, 475 U.S. 1110 (1986).

In this case, while the warrant refers to the affidavit there is no express language of incorporation. Nor does it appear that the affidavit was physically attached to the warrant. However, under the facts of this case, the functional purposes of those two requirements -- to insure that all parties involved are informed of the scope of and limits upon the [*1117] authorized search -- were fully satisfied. See United States v. Wuagneux, 683 F.2d 1343, 1351, n.6 (11th Cir. 1982) (looking to underlying

affidavit even where unattached to warrant, where searchers were adequately informed of limitations on search), cert. denied, 464 U.S. 814, 78 L. Ed. 2d 83, 104 S. Ct. 69 (1983); United States v. Zanche, 541 F. Supp. 207, 213 (W.D.N.Y. 1982) ("it was also proper to examine the affidavit in deciding the degree of specificity required in the warrant"). Warrants must be read in a "commonsense" fashion, see United States v. Ventresca, 380 U.S. 102, 109, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965), and we should not adhere to formal requirements of incorporation and attachment where as here, it is clear that the involved parties were aware of the scope of and limitations on the search.

In this case, it is clear that both the federal agents and Failla were

apprised of these factors. The affidavit was present at the time of the search, and spells out quite clearly the nature and purpose of the proposed search. It explains in detail the motivation behind the search and the nature of the documents sought. When the warrant and affidavit are read together, there is no ambiguity. Moreover, although the warrant may not have explicitly incorporated the affidavit, the presence and activity of agent Hutton, who had read the affidavit and who approved each seizure, satisfies us that the limitations included in the affidavit were observed.

In a broader sense, also, the record establishes that this was not an unreasonable search. Far from showing ambiguity, the documents and testimony show that the agents knew what they were

looking for, and that in executing the search they took only that which they needed and which was contemplated by the authorizing papers. We caution law-enforcement agents, however, to be sensitive to the need to particularly describe in all warrants and applications the nature, extent and limits upon the search to be authorized in order to conform to the fourth amendment's particularity requirement. In this case, because of the presence at the search of the affidavit, agent Hutton's active supervision of the search, the specificity of the affidavit, and the fact that the agents did not exceed the scope of the warrant and affidavit when read together, we conclude that the search was reasonable.

4. Good Faith Issue.

In light of our conclusion that there was no violation of the fourth amendment's requirement of particularity, there is no need to consider whether under Leon, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405, the challenged evidence could also have been permitted on the theory that the executing officers had acted in good faith in relying on the warrant issued by the district court.

C. The "Roving Bug".

1. Background Facts.

In the summer of 1989 the FBI received information about a power struggle within the Patriarca family of LCN. In particular, a Patriarca family "underboss", William Grasso, and a Patriarca "soldier", Francis Salemme,

were murdered. Believing further violence was likely, the FBI intensified its investigation into the Patriarca family.

The FBI believed that some members of the Patriarca family, including Joseph Russo, Vincent Ferrara, and Robert Carrozza, had begun to suspect efforts by law-enforcement officers to surveil their activities. To thwart those efforts, these individuals, along with others, had begun to communicate in varying ways and locations designed to make routine electronic surveillance difficult.

2. Application for the Interception Order.

By the middle of October 1989, the FBI had learned that the Patriarca family intended to induct several new members into the LCN. One of the candidates for

induction was Vincent Federico, who was serving a Massachusetts prison sentence for murder. Recognizing the highly secretive nature of this event, as well as the likelihood that the Patriarca family would seek to avoid any government surveillance of it, the government agents decided to seek a warrant under 18 U.S.C. § 2518(11)(a) that would authorize a "roving bug", i.e., interception by electronic means of oral communications without specifying in advance exactly where or when the [*1118] interception would occur. Specifying Russo, Ferrara, and Carozza as the particular targets of their proposed interception, the government applied to the district court in Massachusetts.

In compliance with the requirements of Title III, the United States Attorney's

office submitted to the Department of Justice a proposed application of special attorney Diane Kottmyer, an affidavit of Walter J. Steffens of the FBI, and a proposed order. These papers were hand-delivered to the justice department on October 24, 1989. They described in detail the efforts by the targeted individuals to thwart surveillance, as well as information indicating that there was probable cause to believe that those individuals had engaged in two murders as well as other criminal activities.

The Steffens affidavit made no mention, however, of a possible LCN induction ceremony. The government claims to have omitted it deliberately for several reasons. First, it was satisfied that the affidavit supplied sufficient information to establish the required

probable cause that criminal conversations would be obtained. Second, the government was concerned that if it revealed that particular confidential information in the affidavit, and should the information later get into the hands of the defendants, the Patriarca family would use violence or other illegal activity to obstruct justice, and the lives of the informants might be placed in jeopardy. In addition, the government did not yet know when and where, or even if, the ceremony would be held.

On October 26, 1989, the FBI learned that the ceremony was planned for Sunday, October 29, 1989, at or near Wellington Circle in Medford, Massachusetts. Suspecting that Federico might be inducted as one of the new members of the LCN, the FBI contacted the Massachusetts'

Department of Correction and learned that Federico had requested a 28-hour furlough, beginning on the morning of October 29, 1989. Federico's furlough application reported that he intended to stay on Sunday, October 29, 1989, at the house of his brother-in-law, Stephan DiStefano, at 34 Guild Street, in Medford, an address that was near Wellington Circle.

Expecting the justice department's approval to arrive very soon, Special Attorney Kottmyer, on the morning of Friday, October 27, 1989, delivered to United States District Judge David Nelson, in Massachusetts, copies of her warrant application, Steffen's affidavit, and the proposed order. That evening, after the justice department had telefaxed its approval, Kottmyer met with

Judge Nelson. The submitted papers did not reveal (1) anything about the anticipated induction ceremony, or [**19] (2) that an authorization for a similar roving-intercept order was simultaneously being sought in Rhode Island to investigate Nicholas Bianco, a defendant in the instant appeal. Kottmyer did, however, alert Judge Nelson that interceptions might take place that weekend.

3. The Order is Issued.

Judge Nelson signed the order approving a roving interception pursuant to 18 U.S.C. § 2518(11)(a). See generally Wire Electronic Communications Interception and Interception of Oral Communications Act, 18 U.S.C. § 2510, et seq. (1988). He was satisfied (1) that

there was probable cause to believe the targeted individuals had committed and were continuing to commit crimes, including murder, through the RICO enterprise; (2) that normal investigative techniques had either been tried unsuccessfully or reasonably appeared unlikely to succeed if tried, or to be dangerous; (3) that there was probable cause to believe evidence of the specified crimes would be obtained through electronic surveillance of oral communications involving the targeted individuals; and (4) that it was not practical to specify each of the locations at which such communications would be intercepted. United States v. Ferrara, 771 F. Supp. 1266, 1280 (D. Mass. 1991).

The order authorized the agents to "intercept oral communications made by, directed to, and/or in the presence of Joseph A. Russo, Vincent M. Ferrara, and Robert F. Carrozza concerning the [earlier identified] offenses, at such various and changing locations." It also authorized the agents to enter buildings surreptitiously to install listening devices, but it required that the court be notified of such entries and their location in [*1119] advance, if possible, or as soon thereafter as possible, if advance notice were not feasible. The order specified that no interception could occur unless visual or other surveillance indicated that Russo, Ferrara and/or Carrozza was present.

4. Surreptitious Entry and Recording of the Conversations.

On Saturday afternoon, October 28, 1989, after observing the DiStefano family leave their home at 34 Guild Street, the FBI decided to install listening devices there. Kottmyer attempted to notify Judge Nelson by telephone of the government's intended entry, but she was unsuccessful.

The next morning at 9:00 a.m., however, she spoke with the judge in his chambers, advising him that pursuant to his order, a surreptitious entry had been made the previous evening, and that the authorized oral interceptions would likely proceed later that day.

Soon thereafter, agents observed Russo and Ferrara enter 34 Guild Street, and the interceptions began. During these

interceptions the government overheard and recorded a ceremony that inducted into LCN four "made" members of the Patriarca family, including Federico. It recorded, apparently for the first time ever, an induction ceremony of LCN. As part of the ceremony (1) new inductees took an oath of lifetime allegiance, loyalty, devotion, and secrecy to the enterprise; (2) the "trigger" finger of each inductee was pricked, and his blood was placed on a picture of a saint that was set afire and held by the inductee in his hands, while he acknowledged that death was his only release from the organization; and (3) each inductee was assigned a "capo" or boss, who was to supervise his criminal activity.

In addition, the old members explained the origins, hundreds of years ago, of

the LCN; the inductees promised that on orders they would kill their brother or son "without hesitation"; and the inductees were instructed that "all business deals legal and illegal" must be "brought to the table" before doing business with any nonmember of the organization. Ironically, at the end of the ceremony, one LCN member observed, "Only the 'f---in' ghost knows what really took place over here, today, by God." Unfortunately for these defendants and LCN, the "ghost" was not alone.

5. Indictments.

Based in part upon the evidence obtained through the "roving bug", indictments were returned, both in this case and in a separate case in the United States District Court for the District of

Massachusetts. United States v. Ferrara, 771 F. Supp. 1266 (D. Mass.). In Ferrara, seven defendants, including Raymond J. Patriarca, Joseph A. Russo, Vincent Ferrara, Robert Carrozza, Carmen Tortora, Dennis Lepore, and Pasquale Barrone, were charged in a superseding indictment filed on March 22, 1990, with being part of a secret enterprise, the Patriarca family, whose illegal activities included specific murders, drug trafficking, extortion, obstruction of justice, gambling, and other crimes. In the present case, Nicholas L. Bianco, Louis R. Failla, Americo Petrillo, Gaetano J. Milano, Salvatore D'Aquila, Jr., Frank A. Pugliano, and Louis Pugliano were charged in a superseding indictment filed December 7, 1990 with the same types of crimes as were charged in Ferrara.

6. Suppression Motions.

A principal pretrial issue in both cases was the admissibility of the "roving bug" tape recording of the LCN induction ceremony. The tapes captured the voices of two defendants in this case, Milano and Failla, and of four of the defendants charged in the Massachusetts indictment.

Motions to suppress the recordings of the ceremony were filed in both the Massachusetts case and this Connecticut case. On April 15, 1991, the Massachusetts district court (Wolf, J.), after extensive hearings, ruled the tape recordings admissible. Ferrara, 771 F. Supp. 1266. On April 19, 1991, the Connecticut district court (Nevas, J.) denied both the defendants' requests for an independent evidentiary hearing in

this case and their motions to suppress. In denying the suppression motions, Judge Nevas [*1120] adopted Judge Wolf's findings of fact and conclusions of law in their entirety.

Judge Wolf had found that the government, in applying for the "roving bug" order, had violated its statutory obligation to make a "full and complete statement" as to why specification of the place where interceptions would occur was not practical. Ferrara, 771 F. Supp. at 1273, 1278-80. Specifically, the government knew, but failed to disclose to Judge Nelson, the following: (1) confidential informants had stated that an LCN induction ceremony was planned to take place near Wellington Circle in Medford, Mass., at 11:00 a.m., on October 29, 1989; (2) Vincent Federico, a person

whom the FBI suspected was to be inducted into the Patriarca family at the anticipated ceremony, had applied for a 28-hour furlough from the Massachusetts prison where he was confined, to begin Sunday morning, October 29, 1989; (3) Federico sought permission to be at 34 Guild Street, Medford, Mass. (his sister's residence) between 11:30 a.m. to 2:30 p.m. on the 29th; (4) because of the above information, the FBI had already set up visual surveillance of 34 Guild Street on October 27; and (5) about six hours before Kottmyer appeared before Judge Nelson, FBI agents saw two of the "roving bug" targets, capos Russo and Ferrara, emerge from 34 Guild Street and drive away in Federico's brother-in-law's car.

Based on these facts, Judge Wolf concluded that the government had failed to disclose to Judge Nelson that it had probable cause to believe that the conversations it wanted to intercept would occur on a particular date, October 29, 1989, and at a particular location, 34 Guild Street. The defendants argue that had these facts been disclosed, Judge Nelson would have been able to issue a standard Title III order to bug 34 Guild Street, rather than authorize the far broader "roving bug" interception.

While Judge Wolf concluded that the government had violated the roving-intercept provision of the electronic-surveillance statute by not telling Judge Nelson of a possible induction ceremony at 34 Guild Street, he also held that the

affiant had acted in complete good faith, that her error was not made in reckless disregard for the truth or for the government's other obligations to the court, and that a fully informed judge would nevertheless have authorized the electronic surveillance at that address. Ferrara, 771 F. Supp. at 1280. He therefore denied the motion to suppress.

After reviewing the parties' submissions, the supplemental affidavits, a transcript of prosecutor Kottmyer's testimony, applicable case law, and Judge Wolf's opinion, Judge Nevas, the district judge in this case, adopted Judge Wolf's order "in its entirety" and similarly denied the suppression motion.

7. Issues on Appeal.

Defendants argue (a) that § 2518(11)(a), the "roving bug" provision, is unconstitutional because it violates the particularity requirement of the fourth amendment; (b) that the "roving bug" order issued under the statute was unconstitutional in failing to protect defendants' fourth-amendment interests; and (c) that the order was deficient because the government failed to disclose certain relevant information to the court in its application for the order. For any or all of these reasons, according to defendants, the recording of the LCN induction ceremony should have been suppressed.

(a) Constitutionality of § 2518(11)(a).

One of defendants' principal arguments challenges the constitutionality of 18 U.S.C. § 2518(11)(a). That section permits, in narrow situations, an order authorizing "roving" surveillance of oral conversations, i.e., interception of conversations without specifying in advance the place where the interception is to occur. Since the constitutionality of a statute is a legal issue, our review is de novo. United States v. Murphy, 979 F.2d 287, 289 (2d Cir. 1992).

In 1968 congress sought to enact a statute that would properly protect the privacy of oral and wire communications, while providing a uniform basis for authorizing their interception in appropriate cases. S. Rep. No. 1097, 90th Cong., 2d Sess. 2, reprinted in 1968 U.S.C.C.A.N. 2112, 2157. With those

concerns in mind, congress enacted Title III of the Omnibus Crime Control and Safe [*1121] Streets Act of 1968 ("Title III"). Pub. L. No. 90-351; 82 Stat. 217.

"The major purpose of Title III [was] to combat organized crime." S. Rep. No. 1097, reprinted in 1968 U.S.C.C.A.N. at 2157. It limits the scope of electronic surveillance by (1) requiring probable cause as to person, crime, conversation, and place or facility of communication, 18 U.S.C. §§ 2518(1)(b), 3(a), 3(b), 3(d), 4; and (2) limiting the duration of surveillance to thirty days. 18 U.S.C. § 2518(b). Surveillance that is properly authorized and carried out under Title III complies with the fourth amendment. See, e.g., United States v. Figueroa, 757 F.2d 466, 472 (2d Cir.), cert. denied,

474 U.S. 840, 88 L. Ed. 2d 100, 106 S. Ct. 122 (1985).

As originally enacted, Title III required that each application for electronic surveillance also include: (1) "a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted"; and (2) a showing of probable cause for belief that this location will be used in connection with an offense. 18 U.S.C. §§ 2518(1)(b)(ii), 2518(3)(d). Under that version of the statute, the surveillance conducted in this case could not have been authorized, because the agents did not have sufficient advance notice of the place.

In 1986, however, congress expanded Title III through the Electronic Communications Privacy Act, Pub. L. No.

99-508, 100 Stat. 1848 (1986), to "update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies." S. Rep. No. 541, 99th Cong. 2d Sess. 32, reprinted in 1986 U.S.C.C.A.N. 3555. Under one of the amendments congress added a new § 2518(11), which authorizes the kind of "roving" electronic surveillance used in this case. Subsection (a) relates to the interception of an oral communication such as occurred in this case, and subsection (b) applies to the interception of a wire or electronic communication.

Section (11)(a) reads as follows:

(11) The requirements of subsections (1)(b)(ii) and (3)(d) of this section relating to the specification of the facilities from which, or the place where

the communication is to be intercepted do not apply if-

(a) in the case of an application with respect to the interception of an oral communication-

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted;

(iii) the judge finds that such specification is not practical * * * . 18 U.S.C. § 2518(11)(a).

Thus, § 2518(11)(a) permits an oral-interception order without specifying the place of surveillance and without a showing of probable cause for belief that the place will be used in connection with an offense if: (1) the application is by a federal officer and is approved by a

high federal official; (2) the application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted; and (3) the judge finds that specification is not practical. 18 U.S.C. § 2518(11)(a)(i)-(iii). Moreover, interceptions may not begin "until the * * * place where, the communication is to be intercepted is ascertained by the person implementing the interception order." 18 U.S.C. § 2518(12).

All other requirements of Title III -- including duration, minimization, sealing, custody, exhaustion of other investigative techniques, and limitation to the crimes that may be investigated through the use of electronic

surveillance -- apply as well to a "roving bug". In this case, the district court judge who issued the order placed an additional restriction upon the government -- that he be informed of any surreptitious entry by the [*1122] agents in advance if possible, and if not possible, then after the entry was completed.

Section 2518(11) has been interpreted by United States courts only three times before this case. See United States v. Petti, 973 F.2d 1441 (9th Cir. 1992) (warrant authorizing wiretap surveillance pursuant to § 2518(11)(b) met particularity requirement of fourth amendment), cert. denied, 123 L. Ed. 2d 480, 113 S. Ct. 1859 (1993); United States v. Silberman, 732 F. Supp. 1057 (S.D. Cal. 1990) (affirmed in relevant

part by Petti); Ferrara, 771 F. Supp. 1266 (roving electronic surveillance provision of § 2518(11)(a) held constitutional as applied). Careful analysis is therefore necessary. We will now consider (1) the problem of standing, (2) the particularity requirement, and (3) our final conclusion as to constitutionality.

(1) Standing.

Intercepted conversations from the 34 Guild Street induction ceremony were introduced against all the defendants at trial. None of the defendants claims any proprietary or possessory interest in the house, and only defendants Milano and Failla were present when the recording was made. Given these circumstances, the government contends that only Milano and

Failla have standing to challenge the roving order, and that none of the defendants has standing to challenge the surreptitious entry into the house at 34 Guild Street.

We have previously denied standing to defendants who seek to challenge electronic surveillance that occurred while they were at another's home. See United States v. Gallo, 863 F.2d 185, 192 (2d Cir. 1988) (Title III suppression provisions to be construed in accordance with standing requirements of fourth amendment; defendants lacked standing to claim minimization violation regarding electronic surveillance at another's home), cert. denied, 489 U.S. 1083, 103 L. Ed. 2d 843, 109 S. Ct. 1539 (1989); United States v. Fury, 554 F.2d 522, 526

(2d Cir.) (same), cert. denied, 433 U.S. 910 (1977).

While those cases dealt with a location-based surveillance statute, rather than with the person-based surveillance statute at issue here, we see no reason to depart from the general principle that standing to assert a fourth-amendment challenge requires a closer connection to the intrusion than merely being adversely affected by the use of its fruits at trial. We conclude that those defendants who were not present lack standing to challenge the interception. See United States v. Bynum, 513 F.2d 533, 535 (2d Cir.) (co-conspirators whose conversations were not intercepted, and who have no possessory interest in the premises subjected to electronic surveillance, lack standing),

cert. denied, 423 U.S. 952, 46 L. Ed. 2d 277, 96 S. Ct. 357 (1975). In other words, only Milano and Failla have standing to contest the order itself.

Since none of the defendants had any legitimate interest in the privacy of the 34 Guild Street residence before they arrived there, they lack standing to assert that the entry to install listening devices injured their rights. See United States v. Volpe, 430 F. Supp. 931, 945 (D. Conn. 1977), aff'd, 578 F.2d 1372 (2d Cir. 1978), cert. denied, 441 U.S. 930, 60 L. Ed. 2d 658, 99 S. Ct. 2049 (1979).

(2) Particularity.

The defendants contend that "the 1986 amendment to Title III, no matter how it is read does away with the particularity

requirement of the Fourth Amendment and is an unconstitutional exercise of Congressional power." U.S. Const. Amend. IV.

The warrant clause of the fourth amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Its purpose was to prevent general searches. Limiting any search authorization to specific areas and things for which there is probable cause ensures that the search "will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." Silberman, 732 F. Supp. at 1061 (quoting Maryland v.

Garrison, 480 U.S. 79, 84, 94 L. Ed. 2d 72, 107 S. Ct. 1013 (1987)).

[*1123] If read literally, the fourth amendment would forbid a warrant that specifies no particular place for the search and leaves the location to be determined at a future time. The Supreme Court, however, has refused to apply the fourth amendment literally, preferring instead a flexible approach designed to keep pace with a technologically advancing society. See discussion Id.at 1061. It "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." Payton v. New York, 445 U.S. 573, 591, n.33 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980). In short, the fourth amendment's "prohibition against 'unreasonable

searches and seizures' must be interpreted 'in light of contemporary norms and conditions.'" Steagald v. United States, 451 U.S. 204, 217, n.10 68 L. Ed. 2d 38, 101 S. Ct. 1642 (1981).

Under its flexible interpretation, the Supreme Court in numerous cases has rejected the narrow shackles that might otherwise flow from a literal reading of the fourth amendment. See, e.g., United States v. Ross, 456 U.S. 798, 72 L. Ed. 2d 572, 102 S. Ct. 2157 (1982) (automobile searches); Michigan v. Tyler, 436 U.S. 499, 56 L. Ed. 2d 486, 98 S. Ct. 1942 (1978) (exigent circumstances); United States v. Brignoni-Ponce, 422 U.S. 873, 45 L. Ed. 2d 607, 95 S. Ct. 2574 (1975) [**36] (border search); Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968) (stop and frisk);

Harris v. United States, 390 U.S. 234, 19 L. Ed. 2d 1067, 88 S. Ct. 992 (1968) ("plain view").

Section 2518(11)(a) specifically addresses some of the concerns expressed by the Supreme Court that warrants be particular; it requires a full and complete statement as to why a particular description of the location to be monitored is not practical. See 18 U.S.C. § 2518(11)(a)(ii). With regard to this section, congress cited an effort to thwart surveillance as an example of impracticality, stating:

The judge must find that the ordinary specification rules are not practical. Situations where ordinary specification rules would not be practical would

include those where a suspect moves from room to room in a hotel to avoid a bug or where a suspect sets up a meeting with another suspect on a beach or a field. In such situations, the order would indicate authority to follow the suspect and engage in the interception once the targeted conversation occurs.
S. Rep. No. 541, 99th Cong., 2d Sess. 32, reprinted in 1986 U.S.C.C.A.N. 3555, 3586.

Among the circumstances, therefore, in which congress intended the "roving bug" to be used was a situation, such as here, where the target is attempting to thwart surveillance. See Ferrara, 771 F. Supp. at 1289.

A "roving bug" order is analogous to the order under § 2518(11)(b) issued in Silberman. Silberman involved the

interception of wire-tapped conversations under § 2518(11)(b), which, unlike § 2518(11)(a), specifically requires "a showing of a purpose on the part of that person to thwart interception by changing facilities." See 18 U.S.C. § 2518(11)(b)(ii). The court in Silberman held that the statute was constitutional as applied, and that once a judge determines that the location of a possible search is being purposely changed by suspects in order to evade detection or interception by law enforcement agents, an order expanding the scope of the search is clearly justified to counteract the attempted evasion. Silberman, 732 F. Supp. at 1062. A similar relaxed particularity standard should apply to oral interceptions under § 2518(11)(a), particularly when (1)

congress cited an effort to thwart surveillance as an example of impracticality under § 2518(11)(a), and (2) the party attempting to evade detection is part of organized crime, which has always been one of the prime targets of Title III.

In addition, unlike other orders under Title III, which requires identification of the anticipated speaker only "if known", § 2518(1)(b)(iv), to satisfy the roving intercept statute, the person targeted for roving interception must be identified, and only conversation involving the specified individual may be intercepted. 18 U.S.C. §§ 2518(4)(c), 2518(11)(a)(ii).

The roving intercept statute also addresses the fourth amendment's requirement that the place to be searched

be particularly described [*1124] "by identifying that location in terms of where a specified individual engages in certain conversation." Ferrara, 771 F. Supp. at 1291. It requires that "interceptions will not begin until * * * the place where the communication is to be intercepted is ascertained." § 2518(12). Section 2518(11) (a)(ii) further provides for defining the place to be searched as the location at which the targeted person is discussing specified crimes. These requirements, when considered along with the other requirements of § 2518(11)(a) and Title III, are constitutionally sufficient to satisfy the particularity requirement of the fourth amendment.

(3) Final Conclusion as to Constitutionality of the Statute.

The interception of an oral conversation falls within the fourth amendment's protections, Berger v. State of New York, 388 U.S. 41, 51, 18 L. Ed. 2d 1040, 87 S. Ct. 1873 (1967), and capturing a conversation through the use of electronic devices is a "search and seizure". Id. "The underlying command of the Fourth Amendment is always that searches and seizures be reasonable * * * . The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'" New Jersey v. T.L.O., 469 U.S. 325, 337, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985).

Congress expressly recognized the importance of combatting organized crime as a major reason for enacting Title III. At the same time, congress imposed substantial conditions on the issuance of any order for electronic surveillance. When it turned to the "roving bug", congress added several more protections against arbitrary surveillance:

(1) It limited the number of people who may seek a roving oral intercept by requiring advance approval from certain high-ranking federal officials. 18 U.S.C. § 2518(11)(a) (i).

(2) It required "a full and complete statement" as to why specification of the place of interception is not practical. 18 U.S.C.§ 2518(11)(1)(ii).

(3) It required identification of the persons committing the offense and whose

conversations are to be intercepted. 18 U.S.C. § 2518(11)(a)(ii). In many cases, "such a limitation in fact protects the fourth amendment interests of innocent third-parties to an even greater extent than do the limitations imposed under a standard * * * order." Silberman, 732 F. Supp. at 1062.

(4) It permited actual interception of communications to begin only when the place where the communication is to be intercepted is ascertained by the implementing agent. 18 U.S.C. § 2518(12).

(5) It retained all of the requirements of Title III -- including duration, minimization, sealing, custody, exhaustion of other investigative techniques, and identification of the crimes that may be investigated through the use of electronic surveillance.

In short, the "roving bug" provision, when examined in light of the other limitations imposed under Title III, permits "no greater invasion of privacy than is necessary." Silberman, 732 F. Supp. at 1063 (quoting Katz v. United States, 389 U.S. 347, 355, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967)). Therefore, mindful not only of the grave law-enforcement purposes underlying § 2518, a s well as the constitutional need to protect against arbitrary governmental intrusions into the privacy of individuals, we conclude that the safeguards required by congress provide adequate protection to preserve the constitutionality of interceptions of oral conversations when authorized under 18 U.S.C. § 2518(11)(a). We therefore

reject defendants' constitutional challenge to the "roving bug" statute.

(b) Constitutionality of the Order.

Defendants also contend that even assuming the statute itself is constitutional, the provisions of the order issued in this case were inadequate to protect their constitutional interests. We disagree.

Judge Wolf's decision in Ferrara, adopted by Judge Nevas in this case, evaluated the order in light of law enforcement's obligation to combat organized crime as well as the need to provide constitutional safeguards [*1125] against invasion of privacy. Judge Wolf correctly held that (1) the search in this case was reasonable; (2) the decision to authorize surveillance

was made by an independent judge; (3) there was a strong showing of probable cause; (4) the order particularly described the thing to be intercepted -- conversations of specified individuals about particular criminal activities; and (5) the order adequately described the place to be searched as the location at which a targeted individual is discussing the specified crimes. Ferrara, 771 F. Supp. at 1292-96.

The order also contained "provisions to minimize the risk that the roving authority it granted could be abused." Id. at 1294. It required notice of any surreptitious entry in advance, if possible, or as soon as possible thereafter -- a procedure that provided the district judge with the opportunity to "revoke or revise the roving intercept

Order if he perceived that the government was attempting too many intrusions, or seeking interceptions at sensitive locations." Id. See also Dalia v. United States, 441 U.S. 238, 258, 60 L. Ed. 2d 177, 99 S. Ct. 1682 (1979). While the agents were unable to reach the district judge before entry, they did advise the judge within hours of the entry and before any interception began.

In addition, the order required the government to file seven-day progress reports with the judge. These reports would also provide the district court judge with information which he could use to revoke or revise the roving intercept order if he thought the government was abusing its authority.

Finally, the order satisfied the requirements of the warrant clause of the

fourth amendment in that it was based on a strong showing of probable cause to believe that the targets were engaged in some of the serious crimes targeted by Title III.

Therefore, application of the "roving bug" statute through the order in this case resulted in a search and seizure that was reasonable within the meaning of the fourth amendment.

(c) Failure to Disclose.

(1) Section 2518(11)(a)(ii): Impracticality.

All defendants claim that the fruits of the roving-intercept order should have been suppressed because of the government's failure to comply with §

2518(11)(a)(ii), which requires the government to provide a "full and complete statement as to why * * * such specification [of the place where the communication is to be intercepted] is not practical." Specifically, they contend that the government did not disclose the information it had regarding the possibility that 34 Guild Street would be the site of a Mafia induction ceremony. Defendants further argue that when a central provision of Title III is violated, 18 U.S.C. § 2515 requires that the resulting evidence be suppressed. They contend that the court should look directly to the exclusionary rule of the statute, rather than to focus on fourth-amendment considerations or a Franks analysis. See Franks v. Delaware, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct.

2674 (1978). Under Franks and its progeny, if a search warrant contains a false statement or omission, and the defendant makes a substantial preliminary showing (1) that the false statement or omission was knowingly and intentionally, or with reckless disregard for the truth, included by the government in a search warrant affidavit, (2) that the information was material, and (3) that with the affidavit's false or omitted material aside, the affidavit's remaining content is insufficient to establish probable cause, then the fruits of the search must be suppressed. Franks, 438 U.S. at 155-56.

Title III contains its own exclusionary rule. It provides that no intercepted communications can "be received in evidence in any trial * * *

if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515. The specific grounds for exclusion under § 2515 are set forth in § 2518(10)(a). They are that: (i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval. 18 U.S.C. § 2518(10)(a).

The government claims that the statutory requirement of a "full and complete" statement [*1126] was not violated here, but argues that even if it were, (1) the Franks standard is applicable, and (2) under that standard the undisclosed information was immaterial, and the issuing judge would

have signed the order even with knowledge of the undisclosed material.

We agree with the district court's application of Franks and with its findings (1) that the defendants did not establish deliberate falsehood or reckless disregard for the truth by the government, and (2) that the nondisclosure of the 34 Guild Street information was immaterial.

When enacted in 1967, §§ 2515 and 2518(10)(a) were not intended "generally to press the scope of the suppression role beyond [then] present search and seizure law." S. Rep. No. 1097, 90th Cong., 2d Sess. 96 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2185; Scott v. United States, 436 U.S. 128, 139, 56 L. Ed. 2d 168, 98 S. Ct. 1717 (1978). At that time there was no good-faith or

other exception to the judicially crafted exclusionary rule for violations of the fourth amendment. Ferrara, 771 F. Supp. at 1299. By 1984, the Supreme Court in Leon, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 , and in Franks, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674, had narrowed the circumstances in which to apply the exclusionary rule, and this left to the courts the dilemma of whether to apply the Franks standard to Title III cases.

Despite the existence of §§ 2515 and 2518 (10)(a), several courts, including this circuit, have applied a Franks analysis to alleged falsehoods or omissions in wiretap affidavits and applications under Title III. United States v. Ferguson, 758 F.2d 843, 848 (2d Cir.), cert. denied, 474 U.S. 841 (1985);

United States v. Mastroianni, 749 F.2d 900, 909 (1st Cir. 1984); United States v. Leisure, 844 F.2d 1347, 1357 (8th Cir.), cert. denied, 488 U.S. 932, 102 L. Ed. 2d 342, 109 S. Ct. 324 (1988); United States v. Ippolito, 774 F.2d 1482, 1485 (9th Cir. 1985).

Use of the Franks standard is consistent with the purposes of § 2515, which are "not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted [**48] also 'to protect the integrity of court and administrative proceedings.'" Gelbard v. United States, 408 U.S. 41, 51, 33 L. Ed. 2d 179, 92 S. Ct. 2357 (1972) (citation omitted). Nothing in the Franks standard goes

against the grain of these purposes. If anything, Franks enhances the protection of the defendants, by applying to the wiretap statute an important constitutional principle that has been accepted by all courts.

While the government should have disclosed to the court the information relating to 34 Guild Street, its failure to do so does not require suppression of the evidence in this case. As the district court properly found, the information was not essential for permitting the interceptions, because there was enough independent information of the nature of the suspects' crimes and their evasive methods to justify issuing the roving order, even without the information about 34 Guild Street. Moreover, even if the judge had been

advised of the anticipated induction ceremony at 34 Guild Street, the information would not have eliminated the need for a roving order, because the members of the enterprise were trying to avoid detection, and could easily have changed the location at the last minute. Therefore, we agree with the district court that under the Franks standard the government's failure to disclose information about 34 Guild Street did not require suppression of the intercepted conversations.

(2) Sections 2518(1)(c) and (1)(e): Other Procedures and Applications.

Milano claims that the government violated 18 U.S.C. § 2518(1)(c) (requiring the government to inform the judge whether other investigative

procedures have been tried and why they were unlikely to succeed) and § 2518(1)(e) (requiring the government to inform the judge of all previous applications for approval of interceptions involving any of the same persons involved in the application), and that the government's multiple violations of these disclosure provisions require suppression of the induction ceremony tape recordings.

[*1127] At the time it applied for the roving bug in the District of Massachusetts, the government had already applied for two other Title III warrants against two of the people named in its application to Judge Nelson: an application in the District of Massachusetts for a warrant for electronic surveillance of Milano's car

(the district court authorized the warrant); and an application in the District of Rhode Island for a roving intercept of Milano's co-defendant Nicholas Bianco (this application was submitted to the district court in Rhode Island simultaneously with the one submitted to Judge Nelson). In its application to Judge Nelson, the government informed him only of prior Title III applications naming Russo, Ferrara, and Carrozza, who were named as targets of the "roving bug" request, and did not mention the applications for surveillance of Milano and Bianco, who were not targets, but merely were mentioned in the affidavit.

Milano contends that the failure to disclose the Milano and Bianco surveillance applications constituted a

violation of § 2518(1)(c), the "necessity" requirement, under which the government must inform the judge "as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed." Judge Wolf rejected this claim, concluding that subsection (1)(c) requires "disclosure only of 'normal' non-Title III investigative techniques" and not other electronic surveillance. Ferrara, 771 F. Supp. at 1313. [**51] Applying Franks, Judge Wolf also held that even if § 2518(1)(c) had been violated, suppression would be inappropriate because the information was not material and was not omitted to mislead Judge Nelson. We agree.

Several circuits, including our own, have held that subsection (1)(c) refers

to non-electronic investigative techniques. See United States v. Torres, 901 F.2d 205, 231 (2d Cir. 1990) ("Section 2518[(1)(c)] 'is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.'") (quoting United States v. Kahn, 415 U.S. 143, 153, n.12 39 L. Ed. 2d 225, 94 S. Ct. 977 (1974)); United States v. Lambert, 771 F.2d 83, 91 (6th Cir.), ("All that is required is that the investigators give serious consideration to the non-wiretap techniques prior to applying for wiretap authority and that the court be informed of the reasons for the investigators' belief that such non-wiretap techniques have been or will likely be inadequate."), cert. denied,

474 U.S. 1034, 88 L. Ed. 2d 577, 106 S. Ct. 598 (1985); see also United States v. Uribe, 890 F.2d 554, 556 (1st Cir. 1989) [**52] (the government is required to "make a reasonable good faith effort to run the gamut of normal investigative procedure before resorting to means so intrusive as electronic interception of telephone calls.") (quoting United States v. Hoffman, 832 F.2d 1299, 1306-07 (1st Cir. 1987).

The legislative history of subsection 1(c) further confirms this view:

Normal investigative procedure would include, for example, standard visual or aural surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants, and the

infilitration of conspiratorial groups by undercover agents or informants. S. Rep. No. 1097, reprinted in 1968 U.S.C.C.A.N. at 2190.

Moreover, as Judge Wolf noted, the enactment of 18 U.S.C. § 2518(11) did not alter the requirements of subsection 1(c), Ferrara, 771 F. Supp. at 1313, although it did modify other subsections, e.g., (1)(b)(ii). If the 1986 amendments were intended to modify subsection (1)(c), then congress would have explicitly done so.

Nothing in the plain language of subsection (1)(c), in the legislative history, or in the case law indicates that the term "other investigative procedures" must include other electronic surveillance. We conclude, therefore, that Judge Wolf correctly held that the

government was not required by § 2518(1)(c) to disclose in its application the electronic surveillance matters concerning Bianco and Milano.

Milano also contends that the government violated § 2518(1)(e), which requires the government to inform the issuing judge of:

> [*1128] all previous applications * * * for approval of interceptions of wire, oral, or electronic communications involving any of the same persons * * * specified in the application. 18 U.S.C. § 2518(1)(e).

Since the duty to disclose prior applications under § 2518(1)(e) covers all persons named in the application and not just those designated as "principal targets", Judge Wolf properly found that the provision was violated. Ferrara, 771 F. Supp. at 1315. He additionally found (1) that subsection (1)(e) goes beyond the requirements of the fourth amendment;

(2) that it is therefore subject to the statutory exclusionary provisions of §§ [**54] 2515 and 2518(10); United States v. Donovan, 429 U.S. 413, 425, 50 L. Ed. 2d 652, 97 S. Ct. 658 (1977); (3) that subsection (1)(e) constitutes a non-central provision of Title III; (4) that the government's failure to comply with the requirements of subsection (1)(e) was in good faith and inadvertent error, and (5) suppression is neither permissible or appropriate. Ferrara, 771 F. Supp. at 1314. We agree with Judge Wolf's conclusions as well as with his application and analysis of Donovan and its progeny. Id. at 1314-17.

In Donovan, the Supreme Court considered a different "naming" subsection of 2518, 18 U.S.C. § (1)(b)(iv). That subsection required the

government to "name an individual if the government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations." Donovan, 429 U.S. at 428. The Court held that "naming" under that subsection was not a constitutional requirement, that it was subject to the exclusionary provisions of Title III, that it was deemed not to play a central, or even a functional, role in guarding against unwarranted use of wiretapping or electronic surveillance, and that the omission of names in that case was inadvertent and did not require suppression. Several courts have interpreted Donovan to mean that even a violation of subsection (1)(e) does not require suppression. See United States v.

Van Horn, 789 F.2d 1492, 1500 n.6 (11th Cir. 1986) (suppression not mandated by inadvertent noncompliance with § 2518(1)(e)), cert. denied, 479 U.S. 854, 93 L. Ed. 2d 123, 107 S. Ct. 190 (1986); see also United States v. Sullivan, 586 F. Supp. 1314, 1323 (D. Mass. 1984) ("It is difficult to see how suppression could be required for noncompliance with § 2518(1)(e) when it is not required for a violation of § 2518(1)(b)(iv).").

The evidence in this case demonstrates that the government believed that it was necessary to disclose prior applications concerning only the proposed targets of the "roving bug", that omission of the prior surveillance applications for Milano and Bianco was not intentional, but inadvertent, and that the omission did not require suppression of the

incriminating tape recordings. As the district court noted, "At the time that she [the prosecutor] made her judgment, the requirements of subsection (1)(e) as applied to a roving intercept application had not been addressed in any reported decisions." Ferrara, 771 F. Supp. at 1316. The district court did not err in denying suppression because of a violation of subsection (1)(e).

CONCLUSION

We hold that § 2518(11)(a) satisfies the particularity requirement of the fourth amendment; that the district court's order permitting surveillance with a "roving bug" was constitutional and valid; that the government's failure to disclose information about 34 Guild Street and prior surveillance

applications did not require suppression of the recording of the LCN induction ceremony; and that the evidence seized at Failla's house was not taken in violation of his fourth-amendment rights.

We have considered and rejected all other arguments raised by the defendants, both as to their convictions and their sentences. We therefore affirm the judgments of the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of September one thousand nine hundred and ninety-three.

Present:

HON. GEORGE C. PRATT
HON. FRANK X. ALTIMARI
HON. GERALD W. HEANEY*
CIRCUIT JUDGES,

USA V. BIANCO Docket No. 91-1672L

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant GAETANO J. MILANO.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in

---

*Hon. Gerald W. Heaney, Circuit Judge of the United States Court of Appeals for the eighth circuit, sitting by designation.

regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the court,
ELAINE B. GOLDSMITH, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of September one thousand nine hundred and ninety-three.

Present:
HON. GEORGE C. PRATT
HON. FRANK X. ALTIMARI
HON. GERALD W. HEANEY*
CIRCUIT JUDGES,

---

*Hon. Gerald W. Heaney, Circuit Judge of the United States Court of Appeals for the eighth circuit, sitting by designation.

USA V. BIANCO Docket No. 91-1672L

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant LOUIS R. FAILLA.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the court,
ELAINE B. GOLDSMITH,Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of October one thousand nine hundred and ninety-three.

Present:

HON. GEORGE C. PRATT
HON. FRANK X. ALTIMARI
HON. GERALD W. HEANEY*
CIRCUIT JUDGES,

USA V. BIANCO Docket No. 91-1672L

---

*Hon. Gerald W. Heaney, Circuit Judge of the United States Court of Appeals for the eighth circuit, sitting by designation.

A petition for rehearing having been filed herein by Appellant NICHOLAS L. BIANCO

Upon consideration by the panel thereof, it is

Ordered that said petition be and it hereby is DENIED.

For the court,
ELAINE B. GOLDSMITH, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA)

V.) NO.: H-90-18 (AHN)

NICHOLAS BIANCO)

SECOND RULING ON ALL DEFENDANTS' MOTION TO SUPPRESS ELECTRONIC SURVEILLANCE

The nine defendants in this case were named in the third superseding, multi-count indictment, returned December

7, 1990, alleging various criminal acts by members and associates of the Patriarca organized crime family of La Cosa Nostra ("LCN"). On January 22, 1991, the court held a hearing on the defendants' numerous motions to suppress electronic surveillance.[1]

This ruling addresses the following motions:

A. Frank Pugliano:

Motion to Suppress Surveillance Pursuant to Title III Order of October 27, 1989 (M.B.D. No. 89-1015);[2]

---

[1]The electronic surveillance was executed pursuant to the Wire and Electronic Communications Interception and Interception of Oral Communications Act, 18 U.S.C.§ 2510 et seq. (1988) (Title III).

[2]This motion was adopted by Salvatore D'Aquila ("D'Aquila"), Frank Colantoni ("Colantoni"), Gaetano Milano ("Milano") and Louis Failla ("Failla").

B. Matthew Guglielmetti:

Motion to Suppress Surveillance Pursuant to Title III order of October 27, 1989 (M.B.D. No 89-1015.[3]

The electronic surveillance the defendants seek to suppress was conducted pursuant to an Order issued October 27, 1989, by Judge David nelson of the United States District Court for the District of Massachusetts. The order was issued pursuant to an application filed by Special Attorney Diane Kottmyer. ("Kottmyer") and a supporting affidavit of Special Agent Walter J. Steffens, Jr., of the Federal Bureau of Investigation. The order authorized the government, pursuant to 18 U.S.C. § 2518 (11) (a), to use roving electronic surveillance to intercept certain criminal communications

---

[3]This motion was adopted by Americo Petrillo, Milano, D'Aquila, Pugliano, Colantoni, and Failla.

involving Joseph Russo, Vincent Ferrara or Robert Carrozza. Pursuant to the Order, on October 29, 1989, at 34 Guild Street, Medford, Massachusetts, the government electronically intercepted and recorded a meeting during which new members of LCN were inducted.

The same issues presented by these motions were recently addressed in the District of Massachusetts before United States District Judge Mark Wolf, where the government sought to use the same evidence in the case of United States v. Ferrara, et al. (Cr. No. 89-289-WF). In Ferrara, Judge Wolf held oral arguments on the defendants' motions to suppress on February 22, 1991, February 26, 1991, February 27, 1991, March 6, 1991, March 14, 1991, and March 25, 1991. During the course of these hearings, the government

submitted several supplemental affidavits ("the supplemental affidavits") describing what it knew about the Guild Street location prior to the issuance of the Order. On March 25, 1991, counsel for the defendants were permitted to examine Kottmyer. On April 15, 1991, Judge Wolf issued a very comprehensive ruling in which he denied the motions to suppress. See Appendix to Ruling. At the conclusion of his learned, extremely thorough ruling, Judge Wolf held:

1. Section 2518 (11) (a) is constitutional as applied;

2. If the manner in which the order was obtained does not require suppression, the good faith exception to the judicially crafted exclusionary rule which applies to Fourth Amendment violations would operate to defeat defendants motions to suppress even if the roving intercept provision were deemed unconstitutional;

3. The government's failure to inform Judge Nelson of the information it developed on October 27, 1989, concerning

the possible use of 34 Guild Street for an imminent Mafia induction ceremony was a violation of § 2518 (11) (a) (ii), but suppression is not a proper remedy for this violation because: (1) the government did not intend to mislead the judge and did not act with reckless disregard for its obligations; and (2) if the omitted information had been disclosed, a reasonable judge would nevertheless have issued a roving warrant explicitly or implicitly authorizing electronic surveillance at 34 Guild Street.

4. The government was not, pursuant to § 2518 (1) (c), required to include in its application information concerning its efforts to intercept the communications of Bianco and Milano and, in any event, suppression would not be justified if a violation of § 2518 (1) (c) were found in this case.

5. The government's failure to disclose the prior applications for electronic surveillance for individuals named in the application in addition to Russo, Ferrara and Carrozza, constituted a violation of § 2518 (1) (e), but suppression is not a proper remedy for this violation;

6. The government was not required to name Raymond Patriarca, Jr., or any defendant similarly situated, as a target or principal in its application for a roving intercept, and its decision not to do so does not justify suppression; and

7. The imperfections in the government's conduct in this case do not individually or cumulatively justify suppression.

Had these same issues not been the subject of six days of hearings before Judge Wolf, the court would have conducted its own extensive hearing on the motions. See United States v. Squitieri, 688 F. Supp. 163 (D.N.J. 1988) (court adopted ruling were identical title III issues raised by defendants had already been addressed by several other judges in different districts). Indeed, the court would have applied the standards set forth in Franks v. Delaware, 438 U.S. 154 (1978). See e.g. United States v. Feola, 651 F. Supp. 1068, 1108 (S.D.N.Y 1987), aff'd, 875 F.2nd 857 (2d Cir.), cert. denied sub nom. Marin v. United States 110 S. Ct. 110 (1989) (court applied Franks to

assess motion to suppress title III electronic surveillance). Furthermore, Senior United States District Judge Clarie's holding in United States v. Gerena, 667 F. Supp. 926-7 (D. Conn. 1987), is persuasive: Electronic surveillance gathered under the supervisory authority of courts in one federal circuit and admissible in that circuit is also admissible in another federal circuit.

The court has carefully reviewed the parties' submissions, the supplemental affidavits, a transcript of the March 25, 1991, Kottmyer testimony, applicable case law and Judge Wolf's excellent ruling. the court adopts Judge Wolf's order in its entirety and is filing his order. Accordingly, the court denies Frank Pugliano's motion to suppress

surveillance pursuant to the title III order of October 27, 1989, (M.B.D. No. 89-1015) (Adopted by D'Aquila, Colantoni, Milano and Failla)) and the court denies Guglielmetti's motion to suppress surveillance pursuant to the title III order of October 27, 1989 (M.B.D. no. 89-1015) (adopted by Petrillo, Milano, D'Aquila, Frank Pugliano, Colantoni and Failla).

SO ORDERED this 19th day of April, 1991 at Hartford, Connecticut.

Alan H. Nevas
United States District Judge

APPENDIX F

ORDER AUTHORIZING INTERCEPTION OF ORAL COMMUNICATIONS

Application under penalty of perjury having been made before me by Diane M. Kottmyer, an investigative or law enforcement officer as defined in Section

2510(7) of Title 18, United States Code, for an order authorizing the interception or oral communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the Court finds:

1. There is probable cause to believe that JOSEPH A. RUSSO, VINCENT M. FERRARA, ROBERT F. CARROZZA, Gaetano Milano, Louis Failla, John Castagna, Frank Pugliano, John Farrell and others as yet unknown have been and are now committing offenses and are conspiring to commit, and will commit, offenses involving the conducting of one or more illegal gambling businesses in violation of 18 U.S.C. §§ 1955 and 371.

2. There is probable cause to believe that JOSEPH A. RUSSO, VINCENT M. FERRARA,

ROBERT F. CARROZZA, Raymond J. Patriarca, Nicholas L. Bianco, Matthew L. Guglielmetti, Jr., Gaetano Milano, Louis Failia, John Castagna, John Farrell, Frank Pugliano, and others as yet unknown have been and are now committing offenses, and are conspiring to commit, and will commit, offenses involving travel and the use of wire facilities in interstate commerce with the intent to promote, manage, establish, carry on, and facilitate the promotion, management and carrying on of unlawful activities and distributing the proceeds thereof, said unlawful activities being business enterprises involving gambling in violation of state law, and thereafter performing and attempting to perform such acts, in violation of 18 U.S.C. §§ 1952 and 371.

3. There is probable cause to believe that JOSEPH A. RUSSO, VINCENT M. FERRARA, ROBERT F. CARROZZA, Angelo Mercurio, Frank Imbruglia, Frank Pugliano, Gaetano Milano, Louis Failla and others as yet unknown have committed murder in violation of state law for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity and are conspiring to do the same in violation of 18 U.S.C. § 1959.

4. There is probable cause to believe that JOSEPH A. RUSSO, VINCENT M. FERRARA, ROBERT F. CARROZZA, Angelo Mercurio, Frank Imbruglia, Raymond J. Patriarca, Nicholas L. Bianco, Matthew L. Guglielmetti, Jr., Gaetano Milano, Frank Pugliano, Louis Failla, John Castagna, John Farrell, and others as yet unknown

are employed by or associated with an enterprise engaged in, or the activities of which affect, interstate or foreign commerce, and have been and will continue to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity and are conspiring to commit said violations, in violation of 18 U.S.C. § 1962.

5. There is probable cause to believe that particular oral communications made by, directed to, and/or in the presence of JOSEPH A. RUSSO, VINCENT M. FERRARA and ROBERT F. CARROZZA, concerning the subject offenses set forth above, will be obtained through interception of oral communications at various and changing locations. These communications are expected to constitute admissible

evidence of the commission of the foregoing offenses. In particular, these oral communications will concern:

(a) The precise nature, scope and extent of the gambling businesses, including the roles of the principals, the identities of the individuals who conduct, manage, supervise, direct or own all or part of the businesses, their length of continuous operation, the methods for settling of accounts and the existence and location of records of the businesses, the dissemination of information relating to planned illegal gambling events, orders and instructions to subordinates and associates, the distribution of gambling proceeds to and from the State of Massachusetts and elsewhere, the collection of debts, and conversations relating to the

administration, conduct and management of the gambling businesses. The communications may also provide evidence of overt acts committed in furtherance of the conspiracy and of the extent of each aider's, abettor's and co-conspirator's knowledge of the criminal activities of the principals.

(b) The precise nature, scope and extent of the interstate travel or use of wire facilities in interstate commerce which are being used to promote, manage, establish, carry on and facilitate the promotion, management and carrying on of the unlawful gambling businesses and the distribution of the proceeds thereof, and thereafter performing and attempting to perform said acts. The communications may also provide evidence of overt acts committed in furtherance of the

conspiracy and of the extent of each aider's, abettor's and co-conspirator's knowledge of the criminal activities of the principals.

(c) The precise manner and means used to commit murder in violation of state law for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, the circumstances surrounding the murder of William Grasso, the identitity and role of individuals involved in the planning and carrying out of the murder and the disposal of Grasso's body, and the motive for the murder of Grasso. The communications may also provide evidence of overt acts committed in furtherance of the conspiracy and of the extent of each aider's, abettor's and co-conspirator's

knowledge of the criminal activities of the principals.

(d) The precise roles of JOSEPH A. RUSSO, VINCENT M. FERRARA, ROBERT F. CARROZZA, Angelo Mercurio, Frank Imbruglia, Raymond J. Patriarca, Nicholas L. Bianco, Matthew W. Guglielmetti, Jr., Gaetano Milano, Frank Pugliano, Louis Failla, John Castagna, John Farrell, and others as yet unknown in the enterprise, including the degree of their conduct or participation, the nature of their association to the enterprise, the degree of the effect of the enterprise on interstate or foreign commence, the precise details of the management of the enterprise, and the precise details of the pattern of the racketeering activity.

6. It is not practical to specify each of the locations at which such oral

communications will be intercepted in connection with the commission of the above stated offenses.

7. Normal investigative techniques either have been tried without success or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

WHEREFORE, IT IS HEREBY ORDERED that Special Agents of the Federal Bureau of Investigation are authorized, pursuant to an application authorized by the Acting Assistant Attorney General for the Criminal Division, United States Department of Justice, the Honorable John C. Keeney, to intercept oral communications made by, directed to, and/or in the presence of JOSEPH A. RUSSO, VINCENT M. FERRARA, and/or ROBERT F. CARROZZA, concerning the above

described offenses, at such various and changing locations.

Such interceptions shall not automatically terminate when the types of communications described above in paragraph (5) have first been obtained, but shall continue until communications are intercepted that reveal the manner in which RUSSO, FERRARA, CARROZZA, their listed co-conspirators and others as yet unknown, participate in the specified offenses, and that reveal the identities of RUSSO's, FERRARA's, and CARROZZA's co-conspirators, their places of operation and the nature of the conspiracies involved therein, or for a period of thirty (30) days, whichever is earlier; pursuant to Section 2518(5) of Title 18, United States Code, the time set forth in this Order shall run from the earlier of

the day on which the investigative or law enforcement officer shall first begin to conduct the interception or ten days from the date of this Order.

It is further ORDERED that Special Agents of the Federal Bureau of Investigation are authorized to enter premises surreptitiously for the purposes of installing, maintaining, repairing and removing any electronic oral interception devices utilized pursuant to the authority granted by this order, providing where feasible, Applicant shall notify the Court in advance of such surreptitious entry. Where notification in advance is not feasible, Applicant shall notify the court as soon possible after the fact of the location and circumstances of the entry.

It if further ORDERED that this authorization to intercept oral communication shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize personal and privileged communications and communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code. No interception of oral communications shall be conducted unless it is determined through physical surveillance or by other means that one or more of the named interceptees is present when the conversation to be intercepted is taking place. This authorization must terminate upon attainment of the authorized objective or, in any event, at the end of thirty (30) days, measured from the

earlier of the day on which an investigative or law enforcement officer first begins to conduct the interception or ten days from the date of the Order.

It is further Ordered pursuant to 18 U.S.C. § 2518(8)(d), that no inventory or return of the results of this electronic surveillance and interception be made before ninety (90) days from the date of the expiration of this Order and any extension thereof and that upon any ex parte showing of good cause to a judge of competent jurisdiction, the service of the above-mentioned inventory or return be postponed for a further reasonable period of time.

It is further ORDERED that Applicant shall provide the Court with a report on or about the seventh (7th), fourteenth (14th), twenty-first (21st) and twenty-

eighth (28th) days following the date of this Order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

/s/ David S. Nelson
United States District Judge

Date: October 27, 1989
Time: 6:25 p.m.

APPENDIX G

UNITED STATES OF AMERICA)

V.) NO.: H-90-18 (AHN)

NICHOLAS BIANCO)

THIRD CONSOLIDATED RULING ON PENDING MOTIONS

* * * *

D. Motions to Suppress

1. Failla's Motion to Suppress

Failla moves to suppress allitems seized on January 9, 1990, during the search of his residence at 58 Cloverdale

Drive, East Hartford, Connecticut. Failla presents two arguments in support of his motion. First, he argues that the warrant application failed to set forth probable cause. Second, he contends that the warrant failed to describe the property to be seized with particularity. A suppression hearing was held on February 19, 1991. Based on testimony, counsels' arguments and written submissions, the court denies Failla's motion to suppress.

a. Facts[10]

---

[10]Rule 12 (e), Fed. R. Crim. P., requires the court to "state its essential [factual] findings on the record." In constructing these findings, the court relies on the credible testimony of the witnesses who appeared at the evidentiary hearing, the exhibits introduced in evidencem and the parties' submissions. Testifying for the government were Special Agent William Hutton ("Hutton") of the Federal Bureau of Investigation ("FBI") and Special

(continued...)

1. On January 8, 1990, Chief Judge Ellen B. Burns signed a search warrant authorizing the search of Failla's residence at 58 Cloverdale Drive, East Hartford, Connecticut.

2. The search warrant application was sworn to by Special Agent Richard T. Roberts ("Roberts") of the FBI.

3. The search warrant directed agents of the FBI to search the Failla residence, and a small shed outside the residence, and to seize "notes, ledgers, envelopes, papers, and records containing initials, names, addresses, dollar amounts, codes, figures, and the like: United States currency."

---

[10](...continued)
Agent Harold Brantley ("Brantley") of the FBI. Failla called no witnesses. Neither Failla nor the government sought transcription of the hearing and thus there are no references to transcript pages inthe court's ruling.

4. The Roberts affidavit set forth portionsof four conversations involving Failla that were intercepted pursuant to court-authorized electronic surveillance.

5. During a conversation recorded August 24, 1989, Louis Failla told his son Mark and Jack Farrell about having "a lot of money on the street." In response to the question '[h]ow do you keep track of who owes you what", Failla stated: "Got to keep a book. I got a little ledger at home." He also stated: "You write everything down. All you got to do is stick it in one of these papers."

6. During a conversation recorded September 1, 1989, Failla told Farrell that the "juice is working." After explaining how certain loan transactions work, Louis Failla stated: "That's the proper way to shylock."

7. During a conversation recorded September 12, 1989, Failla gave his son Mark instructions on what Mark should do in the event Failla died. Failla told his son that "Mama has been keeping an envelope"; that "I got all the names written down"; that "[I] [g]ot twenty-eight thousand on the street"; that "I got all the names written down ... I am going to put a major list away for you and if anything happens, you gotta know what to do. You got to go get the money! You got to go to the wiseguys or go get it yourself ..."

8. The phrase "money out on the streets" generally is understood by law enforcement officers as a so-called "shylock loan" in which the borrower is required to make weekly interest payments known as "juice". The term "wiseguys" is

commonly used when referring to members and associates of La Cosa Nostra, or the Mafia.

9. A confidential informant (CI) advised the FBI that Failla was known on the Hartford area as a person who was engaged in the business of loansharking, and provided details concerning one Hartford area individual who owed Failla fifteen thousand dollars.

10. Special Agent Hutton supervised the search of 58 Cloverdale Drive on January 9, 1990. Special Agent Hutton read the search warrant and supporting papers prior to executing the search. The search of the residence took approximately two hours and involved seven t eight agents. Special Agent Hutton testified that, during the execution of the search, the other agents

brought items to him and he decided whether to seize and catalogue the items. Special Agent Hutton testified that he was looking for evidence related to extrotionate credit transactions and that it was his understanding that the warrant authorized only the seizure of notes, books, and ledgers containing numbers and figures.

11. Special Agent Brantley participated in the search of 59 Cloverdale Drive on January 9, 1990. He investigated Failla's criminal activities during the six to eight months prior to the search and was aware of the electronic surveillance cited in the Roberts affidavit. Immediately prior to the search, Special Agent Brantley read the search warrant and supporting papers and was briefed by Special Agents Roberts

and Hutton concerning the nature of the items to be seized.

12. The return of the search warrant describes the items seized from Failla's residence. The items include: (1) a blue address book; (2) Failla's passport; (3) two sheets of paper (containing numbers and names); (4) a July 29, 1984 copy of the New Haven Register (containing an article on the criminal activities of the late William Grasso); (5) a metal box containing three-by-five cards (on which were written numbers and names); (6) three address books; (7) a 1990 calendar; (8) five safe-deposit keys; and (9) an address book.

b. Discussion.

* * * *

(ii) Particularity

Failla's second argument in support of his motion to suppress is that the warrant authorized an unconstiutionally broad seizure. Specificaly, Failla contends that none of the particularity commonly found in search warrants -- such as the words "which are evidence of violations of 18 U.S.C. § 994" -- limited the search. Thus, Failla claims that the warrant authorized the seizure of "everything from the family Bible to love letters." The court disagrees.

The particularity requirement of the Fourth Amendment serves three related purposes: preventing general searches, preventing the seizure of objects upon the mistaken assumption that they fall within the magistrate's authorization, and preventing the issuance of warrants without a substantial factual basis.

United States v. Young, 745 F.2d 733, 759 (2d Cir.), cert. denied, 470 U.S. 1084 (1984). The particularity requirement must be applied with a practical margin of flexibility, depending on the type of property to be seized. Furthermore, the character of the items to be seized pursuant to a warrant controls, to a large extent, the degree of specificity required in describing them. See United States v. Lowry, 675 F.2d 593, 595 (4th Cir. 1982); United States v. Timpani, 665 F.2d 1, 5 (1st Cir. 1981).

Here, the warrant described the property to be seized as:

> NOTES, LEDGERS,
> ENVELOPES, PAPERS,
> AND RECORDS
> CONTAINING INITIALS,
> NAMES, ADDRESSES,
> DOLLAR AMOUNTS,
> CODES, FIGURES, AND
> THE LIKE: UNITED
> STATES CURRENCY.

The terms "ledger", "envelope", "paper", and "money" were terms Failla used when describing his "shylocking" records. The other two terms, "notes" and "records," were the equivalent of descriptions used by Failla ("you write down everything" and "got to keep a book".) The warrant's list of items to be seized was precise, limited and as detailed as possible under the circumstances. See National City Trading Corp. v. United States, 635 F.2d 1020, 1026 (2nd Cir. 1980). Furthermore, the descriptions used in the warrant are more narrow than descriptions that have been upheld in other cases. See United States v. Kepner, 843 F.2d 755, 757 (3rd Cir. 1988 ("documents, records and personal effects"); United States v. Dennis, 625 F.2d 782, 792 (8th Cir. 1980) ("certain books and records relating to

the extortionate credit transaction business").

Most important, however, is what occurs when the warrant is considered in connection with its supporting application and affidavit: the ambiguities that Failla points to disappear. The application states that the items concealed at the Failla residence are evidence of a violation of 18 U.S.C. § 894 and 1962, and the supporting affidavit details the loansharking business and Failla's reference to his record-keeping.

The Second Circuit addressed the issue of the degree to which an affidavit may be used to supplement the particularity of a warrant in United States v. Marti, 421 F.2d 1263, 1298 (2nd Cir. 1970), cert. denied, 404 U.S. 947

(1971). In Marti several search warrants directed the executing officers to seize "any materials found by them to be in violation of the New York obscenity laws." Marti, 421 F.2d at 1268. The government argued that the generality of the warrant was cured by the specificity of the supporting affidavit. The court struck down the warrant, citing the great "dangers inherent" in a general search that implicated the defendants' First Amendment rights.

The holding in Marti reflects the Second Circuit's recognition that "where the First Amendment is implicated, more stringent limitations on obtaining and executing a search warrant consistently with the Fourth Amendment are imposed." United States v. Bonfiglio, 713 F.2d 932, 939 (2nd. Cir. 1983). Indeed, in

Stanford v. Texas, 379 U.S. 476, 485 (1965), the Supreme Court held that a heightened degree of specificity in a search warrant's description of "things to be seized" is required where the subject materials "are books, and the basis for their seizure are the ideas which they contain." In contrast, where the "special problems associated with the First Amendment are not involved ... more 'reasonable particularity' is permissible." Berger v. New York, 388 U.S. 41, 98 (1967).

In the instant case, the court holds that the affidavit may be referred to in considering particularity claims. See United States v. Wuggneux, 683 F.2d 1343, 1351 n.6 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983) (affidavit in support of search warrant can be used to cure

ambiguities in the warrant); United States v. Zanche, 541 F.Supp. 207, 213 (W.D.N.Y. 1982) ("it was also proper to examine the affidavit in deciding the degree of specificity required in the warrant"). In fact, Special Agents Hutton and Brantley testified that they were familiar with the content of the affidavit and understood the limitations of the search warrant. And the court now is not turning to the affidavit in order to enhance the restrictions of the warrant. The court examines the warrant in the context of the affidavit and concludes that the warrant fully satisfied constitutional requirements. Accordingly, Failla's motion to suppress is denied.

SO ORDERED this 14th day of March, 1991 at Hartford, Connecticut.

Alan H. Nevas
United States District Judge

Supreme Court, U.S.
FILED

931280 FEB 4 1994

OFFICE OF THE CLERK

No. 94-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

NICHOLAS L. BIANCO, LOUIS R. FAILLA, GAETANO J. MILANO and FRANK A. PUGLIANO,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX H

Wendy Hanna Sibbison
Counsel of Record
26 Beech Street
Greenfield, MA 01301
(413) 772-0329
Attorney for Gaetano J. Milano

Jeremiah Donovan
123 Elm Street
Old Saybrook, CT 06475
(203) 388-3750
Attorney for Louis R. Failla

Additional counsel on inside cover.

February, 1994

270 pp

Vincent Bongiorni
101 State Street
Springfield, MA 01103
(413) 732-0222
Attorney for Frank A. Pugliano

William A. Dimitri
Dimitri & Dimitri
733 Douglas Avenue
Providence, RI 02908
(401) 273-5600
Attorney for Nicholas L. Bianco

APPENDIX H

UNITED STATES OF AMERICA
v.
VINCENT M. FERRARA, ET Al.

Crim. No. 89-289WF

United States District Court
D. Massachusetts
771 F. Supp. 1266

April 15, 1991
Corrected June 27, 1991

MEMORANDUM AND ORDER

WOLF, District Judge.

I. Summary

The seven defendants[1] in this case are charged with being members of the Patriarca Family of La Cosa Nostra ("LCN" or "Mafia"). It is alleged that the

---

[1]The defendants are Raymond J. Patriarca, the alleged "Boss" of the Family; Joseph A. Russo, the alleged "Consigliere" or "Counselor" and acting "Underboss;" Vincent Ferrara and Robert Carrozza, alleged "Capo Regimes" or "Captains;" Carmen Tortora, an alleged "Soldier;" and Dennis Lepore and Pasquale Barone, alleged "Associates" of members of the Patriarca family.

Patriarca Family is a criminal organization as defined in the Racketeer Influenced and Corrupt Organization ("RICO") statute, 18 U.S.C. § 1961 et seq. (1988). The Superceding Indictment charges that the Patriarca Family is a highly secret enterprise whose illegal activities have included specified murders, drug trafficking, extortion, obstruction of justice, and gambling, among other things.

Significant evidence of the existence of the illegal enterprise alleged in this case was obtained by the government when -- apparently for the first time anywhere -- it electronically intercepted and recorded a meeting on October 29, 1989, at 34 Guild Street, Medford, Massachusetts in which new members of the LCN were inducted. As part of the

ceremony, the new members: swore their life-long, paramount loyalty to the LCN and acknowledged that only death would end their membership; promised not to divulge the existence or secrets of the LCN; and undertook to kill informants, including their blood relatives, if instructed to do so.

The electronic surveillance at 34 Guild Street was conducted pursuant to a warrant issued on the evening of October 27, 1989, (the "Order" or the "Warrant"), by Judge David Nelson of the United States District Court for the District of Massachusetts. See Appendix 1 hereto. The Warrant was issued on the basis of an application filed by then Special Attorney Diane Kottmyer (the "Application") and a supporting affidavit of Special Agent Walter J. Steffens, Jr.

(the "Steffens Aff.") of the Federal Bureau of Investigation ("FBI"). The Order authorized roving electronic surveillance to intercept certain criminal communications involving Joseph Russo, Vincent Ferrara, or Robert Carrozza.

The Warrant was issued pursuant to 18 U.S.C. § 2518 (11)(a), a relatively new provision of the federal statute authorizing the interception of communications. See The Wire and Electronic Communications Interception and Interception of Oral Communications Act, 18 U.S.C. § 2510 et seq. (1988) ("Title III").[2] Title III was enacted in 1968, after the Supreme Court,

---

[2]The text of § 2518(11) and the provisions of Title III which it modifies, §§ (1)(b)(ii) and (3)(d), is set forth in Appendix 2 hereto.

reversing its prior precedent, explicitly held that the protections of the Fourth Amendment applied to the interception of wire and oral communications. See section III.3 infra. The statute was intended to codify the requirements of the Fourth Amendment as it was then understood to apply to the interception of communications, to supplement the Fourth Amendment's protections with solely statutory safeguards and procedures, and to facilitate the interception of criminal conversations in appropriate investigations -- particularly including investigations of organized crime.

The Fourth Amendment requires that searches and seizures be reasonable and establishes certain requirements for the issuance of warrants. Among these is the requirement that any warrant

"particularly describe the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. As originally enacted, Title III implemented the particularity clauses of the Fourth Amendment by requiring: (1) that each application concerning electronic surveillance include "a particular description of . . . the place where the communication is to be intercepted," 18 U.S.C. § 2518(1)(b)(ii), and (2) that the judge find that "the place where, . . . communications are to be intercepted [is] being used, or [is] about to be used," in the commission of a specified offense, § 2518(3)(d).

In enacting Title III, Congress expressed the belief that electronic surveillance was indispensable to investigating and prosecuting organized

crime. Subsequently, many cases in Massachusetts and elsewhere showed this conviction to be correct. As the ability of the government to intercept criminal conversations became manifest, however, sophisticated criminals began structuring their communications to frustrate efforts to intercept them.

In recognition of this, Title III was amended in 1986 to add "roving intercept" and "roving wiretap" provisions, 18 U.S.C. § 2518(11) (1988). With regard to the roving intercept provision at issue in the instant case, subsection 11 provides that the usual particularity requirements of Title III, § 2518(1)(b)(ii) and (3)(d), do not apply if a judge finds such specification is not practical, based upon an application by the government containing:

> a full and complete statement as to why such specification is not practical and identifying the person committing the offense and whose communications are to be intercepted.
> § 2518 (11)(a)(ii).

In essence, the roving intercept provision replaces the usual practice that the place to be searched be identified in a warrant by an address with a description of that place as the location at which an identified person is engaging in identified criminal conversation. Thus, a roving intercept order gives executing officers less specific direction, and more discretion, concerning the place to be searched than a conventional warrant. Section 2518(11)(a) reflects the contemporary view of Congress and the President that this increased discretion is constitutionally permissible and

appropriate when it is impractical for a warrant to define the place to be searched in conventional terms, particularly if that impracticality is caused by the deliberate efforts of suspects to frustrate surveillance.

At the outset of this case the defendants moved to suppress the evidence intercepted at 34 Guild Street on the ground that the roving intercept provision of Title III violates the particularity clause of the Fourth Amendment and is, therefore, unconstitutional. The government opposed this motion, which presents issues which have not been decided previously by any court.

The court began oral argument on defendants' motion on February 22, 1991. At that time neither the defendant nor

the court were aware that the government had, prior to obtaining the Order in this case, developed information concerning 34 Guild Street as the possible site of an imminent Mafia induction ceremony, but did not include that information in the Application or Steffens' Affidavit furnished to Judge Nelson. In response to an invitation by the court to clarify what, if anything, it knew about 34 Guild Street before issuance of the Warrant, the government filed several affidavits.

Those affidavits indicated that on October 27, 1989, the government's investigation developed several pieces of information indicating that 34 Guild Street would be used two days later for a Mafia induction ceremony. Thus, by that afternoon, there was evidence sufficient to provide probable cause to believe it

would soon be possible and proper to intercept conversations at 34 Guild Street. At the same time the government also had formidable reasons to doubt that they had identified the true location of an imminent Mafia induction ceremony and considerable evidence that the proposed targets of the proposed roving Order were still attempting to thwart surveillance.

Disclosure of the foregoing facts concerning 34 Guild Street caused defendants to supplement their motion to suppress to claim additional statutory as well as constitutional grounds for exclusion of the evidence at issue. Oral arguments on the continually emerging legal issues were held on February 22, 1991, February 26, 1991, February 27, 1991, March 6, 1991, March 14, 1991 and March 25, 1991. On March 25, 1991,

defense counsel were permitted to interrogate Kottmyer on the reasons why she did not on October 27, 1989 revise or supplement the government's submission to provide Judge Nelson with the information the FBI had recently developed regarding 34 Guild Street.

Upon consideration of the evidence, the parties' voluminous memoranda, and analysis of the applicable law, the court now concludes the motion to suppress must be denied. In view of the complexity of the issues presented, and of their importance to all parties, the reasons for this decision are explained in detail in this Memorandum. Briefly summarized, these reasons are as follows.

The constitutionality of the roving intercept provisions now at issue must be analyzed as they were implemented by the

Order issued by Judge Nelson. See section III.1 infra.

In addition, the question whether § 2518(11), as applied in this case, violates the Fourth Amendment requires consideration of the origins of the Amendment and its evolution, particularly as it has been construed concerning electronic surveillance. See section III.2 infra. The Fourth Amendment was a direct response to the general warrants and writs of assistance which gave colonial officials virtually boundless discretion as to where they could search and who or what they could seize. The Amendment was originally enacted to protect individuals and their tangible property from unreasonable searches and seizures.

This protection against unreasonable searches and seizures was afforded by the operation of a series of related provisions of the Fourth Amendment. These provisions include the requirements that, absent special circumstances, searches be conducted pursuant to warrants issued by neutral magistrates, based upon demonstrated probable cause to believe criminal activity is involved, and specifically describing -- and thus limiting -- the place(s) to be searched and the property to be seized.

When it first confronted the issue in 1928, the Supreme Court did not construe the Fourth Amendment to protect oral or wire communications, which are intangible and were not deemed to be within the literal scope of the Amendment's protection of "persons, houses, papers

and effects." In 1967, however, the Supreme Court interpreted the Fourth Amendment to protect conversations. Title III was enacted in response to the Supreme Court's revised interpretation of the Fourth Amendment as it applied to the interception of communications.

The Supreme Court's departure from the traditional, literal application of the Fourth Amendment concerning electronic surveillance paralleled a more functional interpretation of the Amendment in other contexts as well. Thus, at least since 1967, the Supreme Court has increasingly focused on the reasonableness of the search or seizure at issue. At the same time, the Court has relaxed literal requirements of the Fourth Amendment -- or traditional interpretations of those requirements -- when it has found a

search or seizure to be reasonable and has been convinced that it would be impractical to interpret those requirements more rigorously without failing to recognize the legitimate needs of law enforcement. In such cases, the Court has indicated that the use of unconventional forms of warrants are permissible and appropriate when departures from the usual terms of a search warrant are, as a practical matter, necessary to the viability of prior judicial approval of a search and significant special circumstances justify relaxation of the usual requirements. Indeed, the Supreme Court has, in the absence of traditional exigent circumstances, recently approved searches and seizures without warrants or probable

cause on the basis that special needs rendered such conduct reasonable.

This court is persuaded that viewed in the current context of Fourth Amendment jurisprudence, the roving intercept provision of Title III, § 2518(11)(a), is constitutional as applied in this case. This conclusion is consistent with the sole decision addressing the constitutionality of the similar -- but not identical -- roving wiretap provision of Title III, § 2518(11)(b). See United States v. Silberman, 732 F. Supp. 1057 (S.D.Cal. 1990).[3]

---

[3]Two law review articles also address the constitutionality of the roving intercept and wiretap provisions of Title III. See Fishman, Interception of Communications in Exigent Circumstances: The Fourth Amendment, Federal Legislation, and the United States Department of Justice, 22 Ga. L. Rev. 1, 65 (1987); Goldsmith, Eavesdropping Reform: The Legality of

(continued...)

In addition, the judicially crafted exclusionary rule relating to Fourth Amendment violations applies to the execution of the roving intercept Order in this case. See sections III.6 and IV.1, infra. This exclusionary rule now includes an exception for objectively reasonable reliance by a law enforcement officer upon a statute, or upon a warrant if it has been properly obtained. In the instant case, the agents reasonably relied on the validity of the roving intercept provisions of Title III and the Warrant issued pursuant to those provisions. Therefore, if the manner in which the Warrant was obtained does not require suppression, the good faith exception to the exclusionary rule would

---

[3](...continued)
Roving Surveillance, 1987 U. Ill. L. Rev. 401.

operate to defeat defendants' motion to suppress the evidence of the LCN induction ceremony even if the roving intercept provision of Title III were now deemed unconstitutional.

With regard to suppression for violations of Title III, there are now several distinct exclusionary rules which apply to different sections of the statute. See Section IV.1 infra. The provisions of Title III which were intended to enact requirements of the Fourth Amendment are subject to judicially fashioned and evolving constitutional exclusionary rules; these rules include the standards enunciated by the Supreme Court in Franks v. Delaware, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978). The provisions of Title III which are legislated supplements to the

requirements of the Fourth Amendment are subject to the more static exclusionary provisions of the statute, §§ 2515 and 2518(10). A violation of an obligation created solely by Title III does not justify suppression if: (1) the section of the statute at issue does not play a "central" role in guarding against the unwarranted use of wiretapping or electronic surveillance; and (2) the error was inadvertent, rather than part of a deliberate effort to mislead the court, or made in reckless disregard of the government's obligations.

In this case, the court concludes that the government erred in not telling Judge Nelson on October 27, 1989, of the information it had developed regarding 34 Guild Street as the possible site for an imminent Mafia induction ceremony. The

failure to provide this information constituted a violation of the requirement of § 2518 (11)(a)(ii) that the government provide a full and complete statement of why it was, in the government's view, impractical to identify a place to be bugged in conventional terms. Subsection (11) modifies other provisions of Title III which are rooted in the particularity clause of the Fourth Amendment. Thus, consistent with the relevant precedents of the First Circuit in Title III cases involving issues concerning applications for a warrant, the judicially crafted exclusionary rules -- particularly including the standards of Franks -- must be applied to determine whether suppression is the proper remedy for the

violation of subsection (11)(a)(ii) in this case.

Franks directly addressed the circumstances in which evidence should be suppressed if it were alleged that the government had presented false information in an affidavit to persuade a judge that there was probable cause for the issuance of a warrant. In Franks, the Court held that:

> In the event that . . . the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 156. The Court, therefore, established that when Franks applies a defendant must satisfy two requirements

to obtain suppression based upon possible governmental misconduct in connection with obtaining a warrant: first, that the information at issue was known by the government to be false or was presented with reckless disregard for its truth; and second, that the information was essential to the issuance of the warrant. These standards also apply when information has been omitted from an application or affidavit.

Suppression for the violation of § 2518(11)(a)(ii) is not proper in this case because neither of the prongs of the Franks test has been satisfied. As described in detail in this Memorandum, the court is convinced that Kottmyer acted in complete good faith, without any intention to mislead or obtain any tactical advantage, when she failed to

provide Judge Nelson with the information obtained on October 27, 1989 concerning 34 Guild Street. See sections II and IV.3.

In addition, Kottmyer's error was not made in reckless disregard for the truth or for the government's other obligations to the court. As of October 27, 1989, there were no cases construing § 2518 (11)(a)(ii). At that time, it was objectively reasonable for Kottmyer to believe, mistakenly, that the roving intercept provision, § 2518 (11)(a)(ii), which requires a showing of impracticality, was synonymous with the roving wiretap provision, § 2518 (11)(b)(ii), which followed it. The roving wiretap provision requires only a showing that a proposed target is seeking to thwart surveillance. The information

the government had just obtained concerning the possible use of a residence at 34 Guild Street for a Mafia induction ceremony tended to strengthen a showing that Russo, Carrozza and Ferrara, who had no prior connection to that address, were attempting to evade surveillance. Given the ambiguity of the law and the pace and pressure under which decisions had to be made on the afternoon of October 27, 1989, it was not reckless for the government to make the error which the court, after intense and prolonged examination, now finds.

In addition, suppression is not justified because if a reasonable judge had been fully informed regarding 34 Guild Street, he or she would nevertheless have authorized electronic surveillance at that address, either by

signing the proposed Order authorizing the roving interception in its original form or by amending it to add express authorization for 34 Guild Street, as well as other, unspecified locations.

Accordingly, as the standards for exclusion established by Franks have not been satisfied, suppression is not a proper remedy for the violation of § 2518 (11)(a)(ii) in this case.

Nor is suppression justified on the basis of any of defendants' other claims. Contrary to defendants' contention, § 2518(1)(c), the "necessity" provision of Title III, did not require the government to address in its Application electronic surveillance concerning Gaetano Milano and Nicholas Bianco, who were under investigation for some of the same crimes as Russo, Ferrara and Carrozza. See

section IV.3 infra. More specifically, § 2518(1)(c) only requires disclosures concerning the efficacy of non-Title III investigative techniques. Moreover, as this necessity provision is rooted in the Fourth Amendment's requirement of reasonableness, a violation would justify suppression only if the standards of Franks were met. Once again, the court is persuaded that even if § (1)(c) is deemed to have been violated in this case, neither of the requirements for suppression under Franks has been satisfied.

The defendants correctly contend that, pursuant to § 2518 (1)(e), the Application should have disclosed prior applications for electronic surveillance of all of the individuals named in the Application, rather just for the three

individuals designated as "principals." See section IV.5 infra. Subsection (1)(e), however, is a statutory addition to the requirements of the Fourth Amendment. It has, in this district and in other Circuits, been properly characterized as a "non-central" provision of Title III. Thus, where, as here, a violation is inadvertent rather than deliberate or in reckless disregard of the government's obligations, suppression is not justified.

Finally, even if the government could have properly obtained a roving intercept Order for Patriarca or his similarly situated co-defendants, it was not improper for the government to intercept their communications with Russo, Ferrara or Carrozza pursuant to the Order targeting those three individuals only.

See section IV.6 infra. Subsection (11)(a)(ii) is intended to prevent investigators from using a roving intercept order as authority to intercept communications if at least one of the participants is not identified as a target in the order; it is not intended to preclude interception of incriminating conversations involving a target identified in a roving warrant and other individuals.

Defendants' remaining contentions challenge the interception of communications at 34 Guild Street on more conventional [*1275] grounds, such as minimization. These claims are not now ripe for resolution. They will be addressed in subsequent proceedings and decisions.

Accordingly, for the reasons amplified in the following findings of fact and analysis, defendants' motion to suppress the communications intercepted at 34 Guild Street must be denied.

II. The Facts

The following facts are derived primarily from the Application and the Steffens' Affidavit submitted to obtain the Warrant in this case, the four affidavits submitted by the government in opposing defendants' request for testimony in connection with the motion to suppress, the March 25, 1991 testimony of Kottmyer, which was subject to searching cross examination, and the court's assessment of her credibility.

This case arises out of the Department of Justice's continuing investigations of

the alleged Patriarca Family of La Cosa Nostra. In the mid-1980s, the government successfully prosecuted numerous individuals charged with being co-conspirators in a enterprise known as the Patriarca Family of the LCN. See United States v. Angiulo, 897 F.2d 1169 (1st Cir. 1990) cert. denied, 112 L. Ed. 2d 98, 111 S. Ct. 130 (1990); United States v. Zannino, 895 F.2d 1 (1st Cir. 1990), cert. denied, 108 L. Ed. 2d 944, 110 S. Ct. 1814 (1990); United States v. Angiulo, 847 F.2d 956 (1st Cir. 1988), cert. denied, 488 U.S. 928, 102 L. Ed. 2d 332, 109 S. Ct. 314 (1988); United States v. Cintolo, 818 F.2d 980 (1st Cir. 1987); cert. denied, 484 U.S. 913, 98 L. Ed. 2d 216, 108 S. Ct. 259 (1987). Much of the evidence used to obtain those convictions resulted from the electronic surveillance

of 98 Prince Street, Boston, the regular headquarters of Gennaro Angiulo, an "Underboss" of the Patriarca family, and of 51 North Margin Street, Boston, the regular site of certain high stakes poker games. See Angiulo, 847 F.2d at 960; Zannino, 895 F.2d at 3; Cintolo, 818 F.2d at 983-84.

The convictions obtained in the foregoing cases resulted in the incarceration of many of those believed by the government to have been the leaders of the Patriarca Family. However, the government's investigation of the Patriarca Family continued.

In the summer of 1989, the FBI was receiving information about a power struggle within the Patriarca Family. Steffens Aff. p. 14; Affidavit of former Special Agent James A. Ring, dated

February 25, 1991, para. 3(a) ("Ring Aff."). In June, 1989, alleged Patriarca Family "Underboss" William Grasso was discovered murdered in Connecticut. Ring Aff. para. 3(b). Francis Salemme, an alleged Patriarca Family "soldier," was shot the same day. Id. Information available to the FBI indicated that the potential for further violence within the Patriarca Family escalated after these events. Id. para. 3(d).

At the same time, the FBI was receiving information that new members might soon be inducted into the Patriarca Family. Id. para. 3(e). Among those viewed by the FBI as possible candidates for induction was Vincent Federico. Id. para. 3(f). Federico, who was then serving a Massachusetts sentence for murder, was considered by the FBI to be a

close associate and potential gunman for Ferrara. Id.

During the summer of 1989, the government also had information that various purported members of the Patriarca Family, including Joseph Russo, Vincent Ferrara, and Robert Carrozza, were suspicious that efforts were being made to intercept their communications. Steffens Aff. p. 56-66. Therefore, these individuals, among others, arranged to communicate in varying places which would be both difficult to predict and to subject to electronic surveillance. Id. In early July, 1989, Steffens began preparing an affidavit to document the efforts of Russo, Ferrara, and Carrozza to thwart efforts to intercept their conversations in anticipation of seeking authorization to conduct roving

electronic surveillance of those individuals. Supplemental Affidavit of Diane M. Kottmyer, Assistant United States Attorney, dated March 6, 1991, para. 2 ("Kottmyer Supp. Aff.").

By October 20, 1989, the government believed an induction ceremony might take [*1276] place in the next few weeks. Ring Aff. para. 3(g). Because of this information, among other things, a decision was made to seek a warrant authorizing [**23] roving electronic surveillance of Russo, Ferrara, and Carrozza. Id. para. 3(i). The government also decided to seek a similar warrant in Rhode Island concerning Nicholas Bianco, another alleged Patriarca Family member. Kottmyer Supp. Aff. para. 3.

In October, 1989, the Department of Justice had an established procedure for

obtaining authorization to apply for a judicial warrant to conduct electronic surveillance pursuant to Title III. Id. para. 5. This procedure required consultation with the appropriate United States Attorney; submission to Department of Justice headquarters in Washington, D.C. of a proposed application, affidavit, and order; review at headquarters and revisions if suggested by such review; and the approval of the Attorney General or his designee. Id. This process usually took about two weeks. Id. at para. 6. It could, however, be expedited. Id. Indeed, the United States Attorney's Manual stated, in pertinent part, that "in emergency situations, or otherwise where time [was] of the essence," materials could be faxed

from the field to headquarters. United States Attorney's Manual, para. 9-7.113.

In this case, on the morning of Tuesday, October 24, 1989, the necessary papers, including the proposed Application and Steffens' Affidavit, were hand-delivered to the Department of Justice as part of an effort to obtain expedited authorization to apply to the court for a roving intercept order targeted at Russo, Ferrara, and Carrozza. Ring Aff. para. 3(h).

The Steffens' Affidavit detailed considerable information indicating that Russo, Ferrara, and Carrozza, among others, were very concerned about being subject to electronic surveillance and were structuring their communications to frustrate any effort to intercept them. Steffens Aff. pp. 13-66. This information

came from confidential informants, visual surveillance, and tape recordings made in an earlier undercover operation. Id. The affidavit indicated that the proposed targets of the roving intercept attempted to frustrate possible electronic surveillance by not discussing criminal activity on the telephone, not using any site regularly for such discussions, and by often meeting outdoors.

The Steffens' Affidavit also described in considerable detail some -- but not all -- of the information known to the government which indicated that there was probable cause to believe the [**25] principals to be targeted had engaged in murder, as well as other illegal activity, on behalf of the Patriarca Family and that the proposed roving electronic surveillance was necessary and

appropriate to the investigation of their past and continuing criminal conduct. For example, the Steffens' Affidavit included detailed information concerning the targets' possible involvement with the shootings of Grasso and Salemme, Steffens Aff. pp. 13-47, and interstate travel in furtherance of illegal gambling, Steffens Aff. pp. 47-56. The Steffens' Affidavit made no mention, however, of the possible Mafia induction ceremony which had significantly influenced the decision to seek judicial approval to conduct roving interceptions of Russo, Ferrara, and Carrozza.

The omission from the Steffens' Affidavit of any reference to a possible Mafia induction ceremony was deliberate. Second Supplemental Affidavit of Diane M. Kottmyer, Assistant United States

Attorney, dated March 18, 1991 paras. 1, 2 ("Kottmyer Second Supp. Aff."). At the time the affidavit was submitted to the Department of Justice, Kottmyer believed that there was sufficient information to establish the probable cause that criminal conversations would be captured, which is required to obtain a warrant, without relying upon the information concerning the possible induction ceremony. Id. para. 2. The government was concerned, however, that if communications were intercepted and the Steffens' Affidavit was furnished to members of the Patriarca Family, any information it contained relating to a possible induction ceremony might be valuable in their ongoing effort to identify informants. Id. para. 1. The government then had valid reasons to

believe that the Patriarca Family had historically been willing [*1277] to use violence and other illegal means to obstruct investigations and prosecutions. See, e.g., Angiulo, 847 F.2d at 961-62; Cintolo, 818 F.2d at 980; United States v. DiGiacomo, 746 F. Supp. 1176, 1186 (D.Mass. 1990). Thus, the government was anxious not to jeopardize the safety of its informants by unnecessarily compromising their confidentiality. Kottmyer Second Supp. Aff. para. 2.

At the time the government decided not to mention the possible Mafia induction ceremony in the Steffens' Affidavit, it had no information concerning the site for any such ceremony. Ring Aff. para. 3(i); Testimony of Diane Kottmyer on March 25, 1991 ("Tr.") at 31, 37. Thus, the information omitted was initially

relevant to whether the probable cause requirements of Title III were satisfied, but did not then relate to the special question raised by a request for a roving intercept -- whether it was practical to specify the place to be bugged if a warrant issued.

On Thursday, October 26, 1989, however, the FBI learned that a ceremony to induct new members into the LCN would take place on Sunday, October 29, 1989. Ring Aff. para. 3(i); Tr. at 63, 64, 103. One source said the ceremony would occur at 11:00 a.m., near Wellington Circle in Medford, Massachusetts. Ring Aff. para. 3(i); Tr. at 63, 64, 103.

Suspecting that any induction ceremony might include making Federico a member of the LCN, later that day the FBI contacted the Massachusetts Department of

Corrections and, as it had done in the past, inquired about Federico's status. Ring Aff. para. 3(j). The FBI was informed that Federico had applied for a 28 hour furlough, beginning on the morning of Sunday, October 29, 1989. Id. The FBI did not seek to influence whether Federico's request for a furlough would be granted. Id.

On the morning of Friday, October 27, 1989, Kottmyer had delivered to Judge Nelson copies of her Application, the Steffens' Affidavit and a proposed Order, which the Department of Justice had not yet approved for formal submission. Kottmyer Supp. Aff. para. 7; Tr. at 37. As Judge Nelson was told, the documents were furnished for his review in anticipation of Department of Justice

approval later that day. Kottmyer Supp. Aff. para. 7.

Also on the morning of Friday, October 27, 1989, the FBI obtained Federico's furlough application. Ring Aff. para. 3(k). The application stated that Federico intended to be at his sister's residence at 34 Guild Street, Medford, Massachusetts on Sunday, October 29, 1990, from 11:30 a.m. to 2:30 p.m. Id. The FBI was not previously aware of the 34 Guild Street address as a potential site for the roving electronic surveillance. Id.; Tr. at 74, 79, 134.

The FBI promptly placed 34 Guild Street under observation, in part from the home of an FBI agent who lived on Guild Street. Ring Aff. para. 3(l); Tr. at 74, 78-79, 147. At about 12:53 p.m. on October 27, 1989, Russo, Ferrara and

Angelo Mercurio, another alleged member of the Patriarca Family, were observed driving away from 34 Guild Street in a vehicle later identified as belonging to Federico's brother-in-law, Stephan Distefano, who resided at 34 Guild Street. Ring Aff. para. 3(1).; Tr. at 80-82, 149.

The information concerning 34 Guild Street which the FBI had acquired on Friday, October 27, 1989, was communicated to Kottmyer before Department of Justice approval of the Application for a roving intercept order was received. By 1:00 p.m., there was probable cause to believe that on October 29, 1989, the residence at 34 Guild Street would be used for the induction of new members into the Patriarca Family and for the discussion of criminal activity.

Thus, it was then possible to specify one location which there was probable cause to believe was about to be used in connection with the conduct of an illegal RICO enterprise and at which communications could be intercepted pursuant to a warrant authorizing electronic surveillance.

At the same time, the information in the Steffens Affidavit concerning the efforts of Russo, Ferrara, and Carrozza, among others, to evade electronic surveillance demonstrated that there was a significant risk that 34 Guild Street would not actually [*1278] be used for the anticipated induction ceremony. Steffens Aff. pp. 56-66. More specifically, as the Affidavit amply indicated, the targets of the proposed roving interception order had shown a

tendency to arrange their conversations to frustrate any efforts to intercept them. Ring Aff. para. 3(o). The FBI believed that the inherent possibility of a late change in location was enhanced by the sensitivity to security which the LCN would attach to an induction ceremony. Id. The FBI was also concerned that inaccurate information concerning an induction ceremony might have been disseminated as part of an LCN effort to identify informants. Id. Thus, the FBI was skeptical that 34 Guild Street would prove to be the location of a Mafia induction ceremony. Id. at para. 3(o).

In addition, while the government on October 27, 1989, had developed probable cause to believe that 34 Guild Street would soon be used once for a LCN induction ceremony, the conduct described

in Steffens' Affidavit, among other things, provided valid reasons for the FBI to believe Russo, Ferrara, and Carrozza would continue to use various other, changing locations to discuss criminal activity.

The government did not revise the proposed Application, Affidavit, and Order it had provided Judge Nelson for his review that morning. It would not, however, have been impossible or impractical to do so.

Rather, the Department of Justice faxed its approval of the original application and associated documents to Kottmyer at 6:11 p.m. on Friday, October 27, 1989. Kottmyer Supp. Aff. para. 6. Kottmyer and Steffens promptly met with Judge Nelson. Id. para. 8. In the judge's presence, Kottmyer signed the Application

previously furnished and Steffens, under oath, signed his Affidavit in its original form. Id.

The Application and Steffens' Affidavit disclosed prior applications for electronic surveillance concerning the principals targeted by the request for a roving intercept order -- Russo, Ferrara, and Carrozza -- but did not provide such information for other individuals who the government said it had probable cause to believe were engaged in the enumerated offenses, but did not identify as being expected to be overheard if the Order issued. Application paras. 5 and 6; see also Section IV.4, infra, amplifying these facts. Kottmyer limited the disclosure of prior applications for electronic surveillance to the three principals

because she, in good faith, reasonably but erroneously believed this was all that was legally required. Kottmyer Aff. paras. 4, 6.

The Application and Steffens' Affidavit also did not disclose that essentially the same information they contained had recently been used to obtain a warrant from a district judge in Springfield, Massachusetts for electronic surveillance of the automobile of Gaetano Milano, another alleged member of the Patriarca Family being investigated in connection with many of the same crimes as Russo, Ferrara, and Carrozza, including the Grasso murder. Nor did the government inform Judge Nelson that an authorization for a roving intercept was being simultaneously sought in Rhode Island to investigate Bianco's

involvement in the same matters. These matters were not mentioned because Kottmyer, correctly and in good faith, did not believe their disclosure to be required. Kottmyer Supp. Aff. para. 10; see also section IV.3, infra, amplifying these facts. In any event, neither the Milano nor Bianco orders resulted in any interceptions. Kottmyer Supp. Aff. para. 11.

More significantly, however, the Application and Affidavit executed before Judge Nelson on October 27, 1989 still made no mention of the possibility of intercepting an LCN induction ceremony or of the information obtained that day concerning 34 Guild Street as the intended location for that event. Thus, the documents submitted to obtain judicial approval for the roving

intercept did not contain "a full and complete statement" as to why it was, in the government's view, not practical to specify the place where oral communications would be intercepted pursuant to the warrant being sought. Indeed, at the time Steffens' Affidavit was signed, it was a misstatement for him to continue to assert that "specification [*1279] of the location where such communications are to be intercepted is not practical because, as set forth in Part IV infra [Russo, Ferrara, Carrozza] and their associates use various and changing meeting places in the District of Massachusetts with intent to avoid the oral interceptions of those meetings." Steffens Aff. para. 4(g), p. 6 (emphasis added). Similarly, it was incorrect for Steffens to continue to state that "the

extraordinary technique of electronic surveillance of a specific location or telephone is not available in this instance due to the techniques, described in this affidavit, that the targets have employed to thwart such coverage." Id. para. 74(g). These misstatements in the Steffens' Affidavit were not corrected.

Kottmyer did, however, tell Judge Nelson that interceptions might take place that weekend and that, as contemplated by the proposed Order she had submitted, he would be notified in advance, if possible, of any surreptitious entry made in execution of his Order. Kottmyer Supp. Aff. para. 8; Tr. at 95, 108-112; Steffens 302 Report of Investigation on 10/27/89. Although this statement suggested that the government had information concerning a

possible location of an imminent meeting which was not included in its written submission, the judge did not request any elaboration. Rather, he gave Kottmyer his home telephone number, said he would be unavailable on Saturday afternoon, and stated that if he could not be reached before any entry, he should, as also provided by the proposed Order, be notified as soon thereafter as possible. Kottmyer Supp. Aff. para. 8. Kottmyer also told the judge that the targets might be indicted before the 30 day period of the requested warrant expired, but if that occurred, intercepts would immediately terminate. Id.

At the time Kottmyer met with Judge Nelson, she did not believe that 34 Guild Street would actually be used for a Mafia induction ceremony. Kottmyer Second Supp.

Aff. para. 4; Tr. at 103, 134-36. Rather, she felt that her adversaries generally, and Russo particularly, had been very "savvy" in their efforts to evade electronic surveillance. Tr. at 136. She simply could not believe that they would tell Federico the location of an induction ceremony and that he would disclose the address on a furlough application. Kottmyer Second Supp. Aff. para. 4; Tr. at 103, 135-36.

Kottmyer had been busy on the afternoon of October 27, 1989. Tr. at 158. She worked on other matters; spoke with officials of the Department of Justice in Washington, D.C. about the status of the approval for her Application and about the possible indictment of some of the present defendants; and spoke with Ring and

Steffens about 34 Guild Street and other possible places roving intercept authority might be employed. Kottmyer Second Supp. Aff. para. 4; Tr. at 159.

Kottmyer did not consciously consider whether she was required by § 2518(11)(a)(ii) to advise Judge Nelson of the information she had recently received regarding 34 Guild Street. Tr. at 160-61. She understood that provision to require only that an application make a showing that the proposed targets were intentionally attempting to thwart electronic surveillance -- which is the standard to be met to obtain a roving wiretap warrant under § 2518(11)(b)(ii). Tr. at 131. In Kottmyer's view, mentioning 34 Guild Street would have strengthened the evidence of an effort to frustrate electronic surveillance because

it was a residence at which none of the individuals under investigation lived and which would apparently be used only once to avoid detection. Tr. at 135-36, 161-62.

Nor did Kottmyer fail to mention 34 Guild Street to Judge Nelson in order to protect the identity of any informant; to avoid any snags in obtaining the warrant; or to obtain any perceived tactical advantage. Tr. at 163-64.

Rather, Kottmyer considered the information concerning 34 Guild Street only in connection with her obligation under the proposed Order to advise the judge in advance, if possible, of any decision to make an entry. Tr. at 95, 108-112, 136. When she met with Judge Nelson, no decision to install a microphone at 34 Guild Street had been

made and Kottmyer felt it would be [*1280] premature, at best, to seek authorization to enter the residence there. Kottmyer Second Supp. Aff. para. 5; Tr. at 46-47, 82-85. She would, however, have identified that location if she had been asked after advising the judge that an entry might be attempted that weekend. Kottmyer Second Supp. Aff. para. 5; Tr. at 137.

It was an error for the government not to revise its Application and the Steffens' Affidavit to include the information it had obtained concerning 34 Guild Street. As explained in sections III.3 and IV.2, infra, with regard to "probable cause," the government is only required to furnish the court with "a full and complete statement of the facts and circumstances relied upon by the

applicant." § 2518(1)(b) (emphasis added). Thus, the government has some discretion not to rely upon -- and therefore not disclose -- all of the information available to it in seeking to establish probable cause. See § 2518(1)(b). However, the obligation to make "a full and complete statement" as to why the government believes it is "impractical" to specify the place where oral conversations to be intercepted will probably occur is unqualified. The statute requires the government tell the court everything on this issue so an independent, fully informed decision can be made as to whether it is necessary and appropriate to issue a roving intercept warrant. § 2518 (11)(a)(ii).

Nevertheless, after careful consideration of all of the evidence,

including an assessment of Kottmyer's credibility, the court finds her conduct to have been in complete good faith. She did not deliberately withhold from Judge Nelson information she believed was legally required to be disclosed. In view of the fast pace at which matters were proceeding, the government's sincere and well-founded skepticism about whether 34 Guild Street would actually be used for criminal activity, and the lack of clarity concerning whether the "full and complete statement" concerning "practicality" called for by § 2518(11)(a)(ii) to obtain a roving warrant to intercept oral communications required more than the showing of a purpose to "thwart interception by changing facilities" called for by § 2518(11)(b)(ii) to obtain authorization

to intercept telephone conversations, Kottmyer's conduct also did not constitute reckless disregard of her legal obligations. Kottmyer Second Supp. Aff. para. 6; Tr. at 52-53, 131; see section IV.2 infra, amplifying these facts and this analysis.

In addition the omission of the information concerning 34 Guild Street and the related misstatements in the Steffens' Affidavit were not material. Rather, the court finds that if Judge Nelson -- or any reasonable judge -- had been fully informed concerning the possible imminent Mafia induction ceremony and its location, he or she nevertheless would have authorized electronic surveillance of 34 Guild Street, either by signing the proposed order authorizing the roving interception

in its original form or by amending it to add express authorization for 34 Guild Street as well as other, unspecified locations. More specifically, the court finds that any reasonable judge presented on a Friday evening with an Application providing probable cause to believe a Mafia induction ceremony could be intercepted that weekend would not reject a request for a roving warrant and run the risk that the opportunity would be lost while the government attempted to revise and resubmit its papers.

In any event, at 6:25 p.m. on October 27, 1989, Judge Nelson endorsed the proposed Order submitted by the government. See Appendix 2 hereto. In the Order, the court found, among other things: that there was probable cause to believe Russo, Ferrara and Carrozza had

committed, and were continuing to commit, crimes including murder in the conduct of a RICO enterprise, Order paras. 2-4; that normal investigative techniques had either been tried without success or reasonably appeared unlikely to succeed if tried or to be too dangerous, id. para. 7; that there was probable cause to believe evidence of the specified crimes would be obtained through electronic surveillance of oral communications involving Russo, Ferrara, or Carrozza, id. para. 5; and that it was not practical to specify each of the locations at which such communications would be intercepted, id. at 6 (emphasis added).

[*1281] Thus the Order authorized the government to "intercept oral communications made by, directed to,

and/or in the presence of Joseph A. Russo, Vincent Ferrara, and/or Robert F. Carrozza concerning [the earlier identified] offenses, at such various and changing locations." Id. p. 5. The Order also authorized the government to enter buildings surreptitiously to install listening devices, and required the court be notified of such entries and their location in advance if possible, or as soon thereafter as possible if advance notice were not feasible. Id. p. 6. In addition, the Order provided that no interception could occur unless visual or other surveillance indicated that Russo, Ferrara and/or Carrozza was present. Id. The authorization, by its terms, terminated after no more than 30 days. Id. Reports to the court regarding progress toward achievement of the

authorized objectives and the need for continued interception were required every seven days. Id. p. 7.

On the afternoon of Saturday October 28, 1989, Kottmyer and Ring spoke and decided to attempt to install listening devices at 34 Guild Street. Tr. at 85. At about 3:30 p.m., the FBI observed the DiStefanos leave their home at 34 Guild Street with their suitcases. Ring Aff. para. 3(q). At about 4:45 p.m., Kottmyer called Judge Nelson at his residence to inform him of the intended entry, but did not reach him. Kottmyer Aff. para. 3. Although she left her home telephone number, the Judge did not call back. Id.

Kottmyer called and spoke with Judge Nelson in his chambers at 9:00 a.m. on Sunday, October 29, 1989. Id. She informed him that, pursuant to his Order,

a surreptitious entry had been made at 34 Guild Street the previous evening and that interception would likely begin later that day. Id.; Memorandum of Diane Kottmyer dated October 30, 1989.

At about 9:40 a.m. on October 29, 1989, the FBI observed Russo and Ferrara enter 34 Guild Street. Ring Aff. para. 3(u). Interceptions then began. Id. As a result, the government overheard and recorded a LCN induction ceremony. The intercepted conversations also included discussion of certain criminal activities of the Patriarca Family. For example, transcripts of the intercepted conversations indicate that in the presence of most of the defendants in this case, the new members swore their life-long, paramount loyalty to the LCN and acknowledged that only death would

end their membership; promised not to divulge the existence or secrets of the LCN; and undertook to kill informants, including blood relatives, if instructed to do so. At about 4:30 p.m., Russo and Ferrara left 34 Guild Street and the electronic surveillance terminated. Ring Aff. para. 3(v).

During the next two weeks, the FBI unsuccessfully attempted to identify other locations for electronic surveillance pursuant to Judge Nelson's Order. Id. para. 3(w). This effort ended when Russo, Ferrara, and Carrozza were arrested on November 14, 1989. Id.

On November 16, 1989, Russo, Ferrara, Carrozza, Lepore, and Angelo Mercurio were charged in a 57 count, 124 page Indictment alleging, among other things, that they were members of a RICO

enterprise known as the Patriarca Family of the LCN. On March 22, 1990, a 65 count, 152 page Superceding Indictment was returned by the grand jury. It named Patriarca, Tortora, and Barone as additional defendants. The Superceding Indictment disclosed for the first time that the October 29, 1989 Mafia induction ceremony at 34 Guild Street had been intercepted and recorded by the government.

III. The Roving Intercept Provisions Of Title III Are Constitutional As Applied To This Case.

1. The statute must be analyzed as applied to this case.

All of the defendants except Lepore were present and had their communications intercepted at 34 Guild Street on October 29, 1989. Each of those intercepted is an "aggrieved person" with standing to litigate this motion to suppress. See §§ 2510(11) and 2518(10)(a).

[*1282] The defendants contend that the roving intercept provision of Title III should be found unconstitutional on its face. More specifically, defendants contend that a roving intercept order issued pursuant to § 2518(11) may authorize the installation of listening devices at an unlimited number of locations, without any judicial finding that there is probable cause to believe that criminal conversation is about to occur at each location, and therefore would allow executing officers a degree

of discretion which violates the Fourth Amendment.

This court concludes, however, that the constitutionality of the roving intercept provision of Title III must be evaluated as it was implemented by the Order in this case. When so assessed, the roving intercept provision is consistent with the requirements of the Fourth Amendment.

In support of their claim that the provisions at issue should be evaluated facially, defendants mention Berger v. New York, 388 U.S. 41, 18 L. Ed. 2d 1040,, 87 S. Ct. 1873 (1967), in which a New York wiretap statute was invalidated on its face. In Berger, however, four members of the Supreme Court objected to deciding the issue on the face of the statute, rather than as applied. 338 U.S.

at 68 (Stewart, J., concurring in the result)("The issue before us, as Mr. Justice White says, is 'whether this search complied with Fourth Amendment standards.'"); id. at 70-71 (Black, J., dissenting); id. at 90 (Harlan, J., dissenting) ("The court declares without further explanation that since petitioner was 'affected' by [the statute], he may challenge its validity on its face. Nothing in the cases of this Court supports this wholly ambiguous standard . . ."); id. at 107 (White, J., dissenting) ("I dissent from the majority's decision which unjustifiably strikes down [the statute] 'on its face' . . .").

Since the decision in Berger, the Supreme Court has clarified that, with some limited exceptions, when the constitutionality of a statute is

challenged, the question to be decided is whether the statute is unconstitutional as applied in the particular case. Broadrick v. Oklahoma, 413 U.S. 601, 610, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973). As the Court has stated:

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge the statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. . . . [This rule] reflect[s] the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. See Younger v. Harris, 401 U.S. 37, 92, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971). Constitutional judgments, as Mr. Chief Justice Marshall recognized [in Marbury v. Madison, 5 U.S. 137, 178, 2 L. Ed. 60 (1803)] are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the court. Id. at 610-11.

Consistent with this rule, the Supreme Court refused to invalidate on its face the pretrial detention provisions of the Bail Reform Act of 1984. United States v. Salerno, 481 U.S. 739, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987). As the Court stated in addressing this issue:

> The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

Id. at 745. See also Schall v. Martin, 467 U.S. 253, 268 n. 18, 81 L. Ed. 2d 207, 104 S. Ct. 2403 (1984) ("More fundamentally, this sort of attack on a criminal [bail] statute must be made on a case-by-case basis. . . . Outside the limited First Amendment context, a criminal statute may not be attacked as overbroad.").

Indeed, the Supreme Court has indicated that even when statutes have been invalidated [*1283] in part because of their chilling effect on First Amendment rights:

> The statutes [at issue] were unconstitutional as applied to the defendants' conduct, but they were also unconstitutional on their face because it was apparent that any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas. In cases of this character a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner. Such holdings invalidated entire statutes, but did not create any exception from the general rule that constitutional adjudication retires a review of the application of a statute to the conduct of the party before the Court.

City Council v. Taxpayers for Vincent, 466 U.S. 789, 797-98, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984) (footnotes omitted) (emphasis added).

The defendants claim that their First Amendment rights are implicated in this case because the roving intercept was directed at capturing a Mafia induction ceremony, which they say involved defendants' freedom of assembly, association and speech. See, e.g., United States v. Apker, 705 F.2d 293, 301 (8th Cir. 1983) (First Amendment rights are implicated, but do not invalidate search relating to "Hells Angels") cert. denied, 465 U.S. 1005, 104 S. Ct. 996, 79 L. Ed. 2d 229 (1984); United States v. Rubio, 727 F.2d 786, 792 (9th Cir. 1984) (same). It is, however, doubtful that the Patriarca family enjoys such protection.

As of October, 1989, the Patriarca family of the LCN had been proven to be a RICO enterprise in earlier cases. See Angiulo, 897 F.2d at 1176; Zannino, 895

F.2d at 3; Angiulo, 847 F.2d at 960. As the Court of Appeals said in Apker, "not all associations of individuals implicate the right of association. For instance, [there are no] cases finding criminal conspiracies themselves within the realm of the freedom of association." 705 F.2d at 301 n. 8. Similarly, it is doubtful that RICO enterprises are within the realm of freedom of association. Thus, it is questionable whether First Amendment rights are implicated in this case.

Even assuming, however, that there is associational activity protected by the First Amendment at issue here, this court concludes that it is not appropriate to evaluate the constitutionality of 18 U.S.C. § 2518(11) solely on its face, or exclusively on the basis of its potential effect in hypothetical cases.

Rather, as the Court of Appeals for the First Circuit has said in the context of a conspiracy case:

> The fact that a seemingly normal criminal statute, by virtue of its prohibition of conspiracy and crime counseling, may in some instances apply to affect freedom of association or freedom of speech does not invalidate the statute. See United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). The court's obligation is, rather, to make sure that such a statute does not improperly infringe upon speech in any particular instance.

United States v. Spock, 416 F.2d 165, 173 n. 20 (1st Cir. 1969); see also United States v. Rowlee, 899 F.2d 1275, 1278 (2d Cir. 1990) (First Amendment does not provide a defense to conspiracy charge where speech "'is an integral part of conduct in violation of a valid criminal statute.'") (quoting New York v. Ferber, 458 U.S. 747, 761-62, 73 L. Ed. 2d 1113,

102 S. Ct. 3348 (1982)), cert. denied, 111 S. Ct. 87 (1990).

Accordingly, it is necessary to evaluate the constitutionality of the roving intercept provisions of Title III as they apply to the circumstances of this case. More specifically, while the court recognizes that a limited execution of an overly broad warrant may not validate a search, it is necessary to evaluate the constitutionality of § 2518(11)(a) in the context of the Order implementing it in this case. For the reasons explained in the remainder of this section, such analysis indicates that the roving intercept provisions are constitutional as applied in this case.

2. The purposes of the Fourth Amendment and its evolving application to electronic surveillance.

The question whether § 2518(11) violates the Fourth Amendment requires consideration of the origins of the Amendment and its evolution, particularly as it has been construed concerning electronic surveillance. As set forth below, viewed in this context, the roving intercept provision of Title III is constitutional as applied in this case.

The origin of the Fourth Amendment lies largely in the primary causes of the American Revolution. The Amendment was a response to the general warrants and writs of assistance which were "a motivating factor behind the Declaration

of Independence. " Berger, 388 U.S. at 58.[4]

> The general warrant specified only an offense -- typically seditious libel --and left to the discretion of the executing officials the decision as to which persons should be arrested and which places should be searched. Similarly, the writs of assistance used in the Colonies noted only the object of the search --any uncustomed goods -- and thus left customs officials completely free to search any place where they believed such goods might be.

---

[4]The importance of the general warrants and writs of assistance in sparking the American Revolution was evident to John Adams, who observed the argument of James Otis, Jr. concerning the writs before the Supreme Court of Judicature in 1761. As Adams reported it:

> American independence was then and there born; . . . Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against the writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.

2 Legal Papers of John Adams 107 (K. Wroth & H. Zobel) (1965).

Steagald v. United States, 451 U.S. 204, 221, 68 L. Ed. 2d 38, 101 S. Ct. 1642 (1981).

As the Supreme Court in Steagald recognized, the searches and seizures which spawned the Fourth Amendment were often aimed at political dissidents. Id.; see also Stanford v. Texas, 379 U.S. 476, 13 L. Ed. 2d 431, 85 S. Ct. 506 (1965); Entick v. Carrington, 19 Howell's State Trials, 1029 (1765). Such searches were especially offensive because they typically involved "the ransacking by Crown officers of the homes of citizens in search of evidence of crime or illegally imported goods. " Frank v. Maryland, 359 U.S. 360, 363, 3 L. Ed. 2d 877, 79 S. Ct. 804 (1959). The Fourth Amendment was a direct response to these abuses. Id.

As Attorney General Edward H. Levi testified in 1975:

> The words of the Fourth Amendment are mostly the products of James Madison. His original version appeared to be directed solely at the issuance of improper warrants.[5] Revisions accomplished under circumstances that are still unclear transformed the Amendment into two separate clauses. The change has influenced our understanding of the nature of the rights it affects.

The National Security Agency and the Fourth Amendment: Hearings on S. Res. 21 Vol. 5 Before the Senate Select Committee to Study Government Operations With

---

[5]Madison's proposal read as follows:

> The rights of the people to be secure in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

Levi, supra, citing Annals of Cong., 1st Cong., 1st Sess. p. 452.

Respect to Intelligence Activities, 94th Cong., 1st Sess. (1975) (testimony of Edward H. Levi, Attorney General of the United States).

As enacted, the Fourth Amendment states: "[1] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and [2] no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be [*1285] searched, and persons and things to be seized." U.S. Const. amend. IV.

The structure of the Fourth Amendment suggests an overriding interest in assuring that searches and seizures are reasonable. This structure recognizes the possibility that exigent circumstances,

among other things, might render obtaining a warrant impractical. See, e.g., Shmerber v. California, 384 U.S. 757, 761-77, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966) (blood test for drunkenness); Chimel v. California, 395 U.S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034 (1969) (search incident to arrest); California v. Carney, 471 U.S. 386, 85 L. Ed. 2d 406, 105 S. Ct. 2066 (1985) (automobiles).

Usually, however, a warrant issued by an independent judicial officer, based upon a showing of probable cause, was considered to be an essential element of a reasonable search. As the Court stated in Steagald:

> The placement of this checkpoint between the Government and the citizen implicitly acknowledges that an "officer engaged in the often competitive enterprise of ferreting out crime," Johnson v. United States, 333 U.S. 10, 14, 92 L. Ed. 436, 68 S. Ct. 367 (1948), may lack

> sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty and the privacy of his home. 451 U.S. at 212.

In addition, the Fourth Amendment requires that the place to be searched and the items to be seized be described "particularly." The primary purpose of these provisions is to limit the discretion, and promote the accountability, of the officers executing a warrant. A particular description of the thing to be seized precludes general searches and prevents the seizure of one thing under a warrant describing another. Marron v. United States, 275 U.S. 192, 196, 72 L. Ed. 231, 48 S. Ct. 74 (1927).[6] The requirement that the place

---

[6]In Marron, the Supreme Court also stated that, "as to what is to be taken, (continued...)

to be searched be described particularly serves as a similar purpose, and has been interpreted to mean only that the description be "such that the officer with a search warrant can with reasonable effort ascertain, and identify the place intended." Steele v. United States, 267 U.S. 498, 503, 69 L. Ed. 757, 45 S. Ct. 414 (1925).

Our understanding of the purposes and effects of the Fourth Amendment has been

---

[6](...continued)
nothing is left to the discretion of the officer executing the warrant." 257 U.S. at 196. The evolution of Fourth Amendment jurisprudence, however, indicates that this statement is now too expansive. Some discretion in executing a warrant is today recognized as permissible. For example, officers may seize evidence not specified in a warrant if it is discovered in plain view in the course of a legitimate search. Horton v. California, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990); Coolidge v. New Hampshire, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971).

an evolving one. From the outset, the Amendment has been understood to protect the people from the unlimited authority of law enforcement officials to search almost anywhere and seize almost anything which characterized the despised general warrants and writs of assistance.

Over time, however, the Amendment has been construed to serve other purposes. One such purpose is to accord to each individual a measure of autonomy and privacy, which are vital to human dignity. As Justice Louis Brandeis stated it in his dissent in Olmstead v. United States, in the Fourth Amendment the Founders "conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men. " Olmstead v. United States, 277 U.S. 438,

478, 48 S. Ct. 564, 72 L. Ed. 2d 944 (1928) (Brandeis, J., dissenting). Thus, while the Fourth Amendment does not establish an unqualified right to privacy, promoting individual autonomy is a value close to its core. Levi, supra.

As a corollary of this, the Fourth Amendment reflects a special concern with intrusions when the purpose is to obtain [**57] evidence to incriminate the victim of a search. Id. This concern for self-incrimination is reflected in the Supreme Court's test which limits standing to invoke the exclusionary rule to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search. United [*1286] States v. Calandra, 414 U.S. 338, 348, 38 L. Ed. 2d 561, 94 S. Ct. 613 (1974).

The Fourth Amendment also reflects a particular concern for protecting freedom of thought, speech, and religion. As Justice Lewis Powell wrote, "Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs." United Sates v. United States District Court, 407 U.S. 297, 314, 32 L. Ed. 2d 752, 92 S. Ct. 2125 (1972).

The interpretation of the Fourth Amendment as applied to electronic surveillance has been especially characterized by evolution. In Olmstead, Chief Justice William Howard Taft, writing for the majority, found that wiretapping a telephone conversation to develop evidence to be used in a criminal trial did not constitute a "search" or

"seizure" in the absence of a physical trespass. Olmstead, 277 U.S. at 464. The Amendment expressly protects the right of the people to be secure in their "persons, houses, papers and effects." These words indicate a concern for tangible items. Thus, Chief Justice Taft found that for the Fourth Amendment's prohibition to apply, the search at issue must be for "material things." Id. Accordingly, in the absence of a physical entry to a house or office, the interception of telephone communications was found in Olmstead not to involve a "search" or "seizure" within the meaning of the Fourth Amendment. Id.

In his dissent, Justice Brandeis decried the Chief Justice's analysis, stating that, "time and again, this Court in giving effect to the principle

underlying the Fourth Amendment, has refused to place an unduly literal construction upon it." Id. at 476 (Brandeis, J., dissenting). Echoing this view, Justice Oliver Wendell Holmes, Jr. wrote, "I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them." Id. at 469 (Holmes, J., dissenting).

After Olmstead, the interpretation of the Fourth Amendment in cases concerning the interception of wire and oral communications steadily departed from application of its literal language and increasingly adopted a functional approach aimed at protecting privacy from unreasonable searches. See Goldman v. United States, 316 U.S. 129, 86 L. Ed. 1322, 62 S. Ct. 993 (1942) (indicating

that private conversation could be a protected "effect" within the meaning of the Fourth Amendment); Silverman v. United States, 365 U.S. 505, 5 L. Ed. 2d 734, 81 S. Ct. 679 (1961) (abandoning theory of trespass and relying on concept of a "constitutionally protected area" to suppress overheard evidence); Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963) (expressly holding Fourth Amendment protects against overhearing of verbal statements). This trend led to the recognition in Berger that Olmstead had effectively been overruled. Berger, 388 U.S. at 41.

In Berger, the Supreme Court invalidated the New York wiretapping statute because of a combination of defects which cumulatively violated the Fourth Amendment. Id. The Court found

that the statute at issue satisfied the requirement that a warrant be issued by an independent judicial officer. Id. at 54. The statute was deemed constitutionally infirm, however, because it: did not require a showing of probable cause to believe a particular offense had been or was being committed, id. at 58-59; did not require a particular description of the conversations to be intercepted, other than to identify the targeted individual, id. at 59; was for a two-month period, and permitted extensions without any further showing of probable cause, id. at 59; and did not provide for the return of the warrant to a judicial officer. Id. at 60. Thus, the Court found that the statute failed to meet the Fourth Amendment's probable cause requirement and unconstitutionally

left too much discretion to the executing officers. Id. at 59-60.

[*1287] In Berger, the Supreme Court contrasted the New York statute with the procedure it had recently affirmed in Osborn v. United States, 385 U.S. 323, 17 L. Ed. 2d 394, 87 S. Ct. 429 (1966). Berger, 388 U.S. at 57. In Osborn, a judicial warrant, based on a showing of probable cause to believe a crime was being committed, was issued for the surreptitious tape recording of a conversation with the consent of one of the participants. 385 U.S. 326-330. As described in Berger, the warrant in Osborn "afforded similar protections to those that are present in the use of conventional warrants authorizing the seizure of tangible evidence." 388 U.S. at 57 (emphasis added).

The Court reiterated this observation concerning Osborn in Katz v. United States, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967). In Katz, the Court emphasized that, "although the protections afforded the petitioner in Osborn were 'similar . . . to those . . . of conventional warrants, they were not identical" because they did not provide for advance notice to the suspect of the intended search. 389 U.S. at 355 n. 16. In both Berger and Katz, the Supreme Court stated that the protections provided by the somewhat unconventional warrant in Osborn were constitutionally sufficient because they permitted "no greater invasion of privacy . . . than was necessary under the circumstances." Berger, 388 U.S. at 57; Katz, 389 U.S. at 355.

Katz clearly established, however, that a warrant was required for a wiretap, even in the absence of a trespass because, as the Court then held, "the Fourth Amendment protects people not places." 389 U.S. at 351. The Court invalidated the warrantless wiretap at issue in Katz because the government had not obtained a warrant in circumstances where a judicial order similar to that issued in Osborn "could have accommodated 'the legitimate needs of law enforcement' by authorizing the carefully limited use of electronic surveillance." Id. at 355-56 (quoting Lopez v. United States, 373 U.S. 427, 464, 10 L. Ed. 2d 462, 83 S. Ct. 1381 (1963) (Brennan, J., dissenting)).

Accordingly, by 1968, Olmstead had been clearly overruled; the Supreme Court

had established that the Fourth Amendment applied to the interception of wire and oral communications; and it was clear that judicial warrants would generally be required for such interceptions. Significantly for this case, however, the Supreme Court also then recognized that such orders might properly differ from conventional warrants aimed at searches and seizures for tangible items in order to accommodate "the legitimate needs [**63] of law enforcement." Id.

3. The Enactment and Evolution of Title III.

In 1968, Title III was enacted as a direct response to the recent decisions in Berger and Katz. Congress sought to enact a statute which would properly protect the privacy of oral and wire

communications, while delineating a uniform basis to obtain authorization of their interception in appropriate cases. S. Rep. No. 1097, 90th Cong., 2d Sess. 2, reprinted in 1968 U.S. Code, Cong. & Admin. News 2157 (hereinafter "1968 Leg. Hist. at ___").

"The major purpose of Title III [was] to combat organized crime." 1968 Leg. Hist. at 2157. Congress and the President moved quickly to enact Title III because it was recognized that "intercepting the communications of organized criminals is the only effective method of learning of their activities." Id. at 2159; see also 1968 Leg. Hist. at 2177.

Title III as originally enacted contained provisions intended to meet the requirements of the Fourth Amendment as expressed in Berger and Katz, and also

contained many additional provisions to regulate the interception of communications which were not constitutionally compelled. As explained in Section IV.1, infra, this distinction has come to make a difference with regard to motions to suppress. The judicially crafted and evolving exclusionary rule concerning violations of the Fourth [*1288] Amendment is applicable to violations of the provisions of Title III which reflect constitutional commands, while the static statutory exclusionary provisions of Title III govern violations of sections of the statute which are solely legislated requirements.

Title III recognizes that there may be emergency situations involving organized crime in which it would not be possible to obtain a warrant to intercept

communications. See 18 U.S.C. § 2518(7) (1988). In such limited circumstances, brief warrantless surveillance, subject to later judicial approval, is authorized. Id. Absent such an exigency, however, the statute requires a judge to issue an order authorizing the interception of any oral or wire communication.

To obtain a warrant to intercept communications the government must make a "full and complete statement of the facts and circumstances relied upon" to satisfy several constitutional criteria. § 2518 (1) (b), (c), (d). These include a "full and complete statement as to whether or [**65] not other investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed if tried or to be too

dangerous." § 2518(1)(c). This showing of necessity reflects the Fourth Amendment requirement that searches and seizures be "reasonable" and addresses the related statements in Berger, 388 U.S. at 57, and Katz, 389 U.S. at 355-56, that courts should authorize "no greater invasion of privacy . . . than [is] necessary under the circumstances." See also Goldsmith, The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance, 74 J. Crim. L. & Criminology 1, 126 (1983).

Title III also requires that the government furnish the court with the information it relies upon in representing that probable cause exists to believe that a particular offense has been or will be committed; particularly describing the place where oral

communications will be intercepted; particularly describing the type of communications sought to be intercepted; and identification of the person, if known, committing the offense and whose communications are to be intercepted. § 2518(1)(b) (i), (ii), (iii) (emphasis added). Congress thought all these provisions were necessary to address the particularity requirements of the Fourth Amendment. 1968 Leg. Hist. at 2190. The Supreme Court subsequently clarified, however, that "it is not a constitutional retirement that all those likely to be overheard engaging in incriminating conversations be named." United States v. Donovan, 429 U.S. 413, 427 n. 15, 50 L. Ed. 2d 652, 97 S. Ct. 658 (1977).

The statute provides that the judge may require that the government furnish

additional information in support of its application. § 2518(2). It also provides that the judge may enter an order authorizing an interception "as requested or as modified" by the judge. § 2518(3). Any such order, however, is required to include findings by the issuing judge that, among other things, the statutory provisions of Title III which implement the probable cause and necessity requirements of the Fourth Amendment are satisfied. § 2518(3)(a)(b)(c). In addition, except with regard to roving intercepts and wiretaps, the court must find there is probable cause to believe that criminal conversations will be intercepted at a specified location. § 2518(3)(d).

As indicated earlier, Title III also includes many provisions which do not

reflect commands of the Fourth Amendment. For example, these include the statutory requirements that the government's application be authorized by a senior official of the Department of Justice, that all prior applications for electronic surveillance of certain individuals be identified, that all intercepted conversations be recorded, and that such tapes be sealed. §§ 2516(1), 2518(1)(c), 2518(8).

In 1986, Congress amended Title III to, among other things, add the roving intercept provisions at issue in this case. § 2518(11). Section 2518(11) reflects a recognition that criminals, particularly including members of organized crime, have become aware of the government's ability to [*1289] intercept their communications and often

endeavor to frustrate such law enforcement efforts.

Subsection 11(a), which relates to the interception of oral communications, relaxes the usual Title III requirements that the government provide the court in advance with "a particular description of . . . the place where the communication is to be intercepted," § 2518(1)(b)(ii), and the requirement that the court find that there is probable cause to believe that [**68] place is "being used, or [is] about to be used in connection with" an offense for which electronic surveillance is authorized" by Title III, § 2518(3)(d). To obtain such an order, the government must furnish the court with:

> [A] full and complete statement of why such specification is not practical and identifying the person committing the offense and whose

communications are to be intercepted.

§ 2518(11)(a)(ii) (emphasis added). The court must then find the usual specification of the place to be searched "is not practical." § 2518(11)(a)(iii).

The parallel provision concerning roving wiretaps for the interception of telephone communications requires the government to identify the person committing the offense and "a showing of a purpose, on the part of that person, to thwart interception by changing facilities." § 2518(11)(b)(ii). Once again, the court must independently determine that the required showing has been made. § 2518(11)(b)(iii).

Thus, while the roving intercept and roving wiretap provisions were apparently similarly motivated, they include somewhat different, and potentially

confusing, standards. More specifically, the roving intercept provision requires a "full [**69] and complete statement;" the roving wiretap provision does not. Similarly, the roving intercept provision requires a showing that it is impractical to satisfy the usual specification requirements of Title III; the roving wiretap provision requires a demonstration that the individual to be targeted is attempting to evade interception.

The legislative history does not indicate whether these distinctions were intended to have substantive effects. With regard to the roving interception provisions, Congress cited an effort to thwart surveillance as the example of impracticality, stating:

> The judge must find that the ordinary specification rules are not

> practical. Situations where ordinary specification rules would not be practical would include those where a suspect moves from room to room in a hotel to avoid a bug or where a suspect sets up a meeting with another suspect on a beach or a field. In such situations, the order would indicate authority to follow the suspect and engage in the interception once the targeted conversation occurs.

S. Rep. No. 541, 99th Cong. 2d Sess. 5, reprinted in 1986 U.S. Code Cong. & Admin. News 3555, 3586 (hereinafter "1986 Leg. Hist. at ___").

The corresponding legislative history concerning the roving wiretap provision, which immediately follows the above-quoted language, simply states that "the rule with respect to 'wire communications' is somewhat similar." Id. It then goes on to cite examples of a terrorist who moves from phone booth to phone booth to avoid detection, or a person who is overheard saying he or she

will use different telephones to evade surveillance. Id.

Thus, it appears that the roving intercept provision contemplates that a roving authorization will often be obtained in cases where specifying a location in advance is not practical because the target is attempting to thwart surveillance, but is not limited to such circumstances.

In any event, the roving intercept provision does not relax the usual Title III provisions which relate to the Fourth Amendment requirement that the conversation to be intercepted -- which is the thing to be seized -- be described with particularity. Indeed, in contrast to the usual case where the anticipated speaker must be identified only "if known," 2518(1)(b)(iv), the person

targeted for roving interception must be identified and only specified criminal [*1290] conversation involving [**71] that individual may be intercepted. §§ 2518(4)(c), 2518(11)(2)(ii).

In addition, the roving intercept provisions address the Fourth Amendment's requirement that the place to be searched be particularly described by identifying that location in terms of where a specified individual engages in certain conversation. Interceptions pursuant to a roving intercept order "shall not begin until . . . the place where the communication is to be intercepted is ascertained." § 2518(12). In this case, this statutory provision was implemented in the Order which required that no interception occur unless visual or other surveillance indicated that one of the

targeted individuals was present. It is this aspect of the Warrant which defendants' most strenuously assert is constitutionally inadequate.

As set forth below, however, the court concludes that the search and seizures authorized by the Order implementing the roving intercept provisions in this case were reasonable and satisfied the particularity requirements of the Fourth Amendment, including the requirement that the place to be searched be particularly described.

4. The evolution of the Fourth Amendment since Berger and Katz.

Since the Supreme Court decided Berger and Katz in 1967, its interpretation of the Fourth Amendment has continued to evolve in ways which must be recognized

in resolving defendants' claim that the roving intercept provision of Title III is unconstitutional. Among other things, the Court has observed that, "crime has changed, as have the means of law enforcement . . . . [thus the Fourth] Amendment's prohibition against 'unreasonable searches and seizures' must be interpreted 'in light of contemporary norms and conditions.'" Steagald v. United States, 451 U.S. 204, 217 n. 10, 68 L. Ed. 2d 38, 101 S. Ct. 1642 (1981) (quoting Payton v. New York, 445 U.S. 573, 591, n. 33, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980)). Accordingly, Justice William Brennan's observation that "the requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement" remains valid. Lopez v. United States,

373 U.S. 427, 464, 10 L. Ed. 2d 462, 83 S. Ct. 1381 (1963) (Brennan, J., dissenting); see also Berger, 388 U.S. at 63.

In addition, the Supreme Court has, at least since the era in which Berger and Katz were decided, affirmed the relaxation of traditional Fourth Amendment requirements where it was impractical to implement them and the intrusions at issue were deemed necessary and reasonable. In 1968, Chief Justice Earl Warren wrote the opinion finding that police can conduct a limited stop and frisk upon less than probable cause because "as a practical matter" a stop and frisk could not be subject to a warrant and probable cause requirement and still allow law enforcement officers to take the measures required to assure

that those stopped for questioning are not armed and dangerous to them. Terry v. Ohio, 392 U.S. 1, 20-21, 23-24, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). Similarly, the Court's holding that a roving Border Patrol may stop a car and briefly question its occupants upon less than probable cause was based in part upon "the absence of practical alternatives for policing the border." United States v. Brignoni-Ponce, 422 U.S. 873, 881, 45 L. Ed. 2d 607, 95 S. Ct. 2574 (1975).

More recently, the Supreme Court has increasingly emphasized that "the fundamental command of the Fourth Amendment is that searches and seizures be reasonable." New Jersey v. T.L.O., 469 U.S. 325, 340, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985). As a result, the Court has approved searches and seizures in a

school, leading to a criminal prosecution, without requiring a warrant or the existence of probable cause to justify the intrusion. Id. Similarly, the Court has approved alcohol and drug testing for railway workers following accidents, for which criminal prosecutions are possible, without requiring a warrant or even reasonable suspicion that a particular employee may have been impaired. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, [*1291] 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989). The decisions in both Skinner and T.L.O. rested on the Court's perception that requiring warrants and probable cause for a search were impractical. Skinner, 489 U.S. at 619; T.L.O., 469 U.S. at 351 (Blackmun, J., concurring).

As a corollary of this increasing willingness to dispense with the warrant and probable cause requirements of the Fourth Amendment, the Court has required the utilization of judicial warrants, but encouraged flexibility concerning their content when conventional terms could not feasibly be employed. Thus, while requiring a warrant for administrative housing code searches, which could lead to criminal prosecutions, the Court indicated that it was not necessary to have probable cause to believe a particular building contained a code violation to obtain an order authorizing entry. Camara v. Municipal Court, 387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1987). Rather, the Court indicated, an appraisal of conditions in an area as a whole would suffice. Id. at 536. In

these circumstances, the court emphasized that "reasonableness is still the ultimate standard," id. at 539, and explained that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails," id. at 536-37.

Similarly, the Supreme Court has indicated that a warrant is needed to search vehicles some distance from our borders for illegal entrants, but suggested that a special form of order would be appropriate. Almeida-Sanchez v. United States, 413 U.S. 266, 284-85, 37 L. Ed. 2d 596, 93 S. Ct. 2535 (Powell, J., concurring). As Justice Powell put it, "'different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to

the legitimate need of Government . . . and the protected rights of our citizens.'" Id. (quoting, [**76] United States District Court, 407 U.S. at 322-23).

Most significantly for this case, the Supreme Court has indicated that it would be appropriate to relax the specificity of the description of the place to be searched in a warrant if this were necessary to the viability of requiring a judicial order for a search and seizure. United States v. Karo, 468 U.S. 705, 82 L. Ed. 2d 530, 104 S. Ct. 3296 (1984). In Karo, the government placed a beeper in a container of ether, an ingredient used in making illicit drugs. It then monitored the beeper as the container was transported to and kept in a specific house. The information generated by the

beeper was used to secure a search warrant for that residence, which resulted in a criminal prosecution. Id. at 714.

The Supreme Court in Karo found that the monitoring of the beeper at the house was the functional equivalent of an entry to determine whether the container was there, and thus constituted a warrantless search and seizure. Id. at 715. This was deemed to be unreasonable and, therefore, a violation of the Fourth Amendment. Id. The Court explained that "requiring a warrant will have the salutary effect of ensuring that use of beepers is not abused, by imposing upon agents the requirement that they demonstrate in advance their justification for the desired search." Id. at 717.

While invalidating the warrantless search and seizure in Karo, the Court recognized that it would not be possible to identify in a warrant the address at which the beeper would be monitored because this was the exact information the beeper was employed to discover. However, the Court stated in language particularly meaningful for the instant case:

> We are also unpersuaded by the argument that a warrant should not be required because of the difficulty in satisfying the particularity requirement of the Fourth Amendment. The Government contends that it would be impossible to describe the "place" to be searched, because the location of the place is precisely what is sought to be discovered through the search. However true that may be, it will still be possible to describe the object into which the beeper is to be placed, the circumstances [*1292] that led agents to wish to install the beeper, and the length of time for which beeper surveillance is requested. In our view, this information will suffice

> to permit issuance of a warrant authorizing beeper installation and surveillance. Id. at 718 (emphasis added).

From the foregoing, the court concludes that the following principles are applicable to determining the constitutionality of the roving intercept provisions now at issue. Any search and seizure must be reasonable. Obtaining a warrant from a detached judicial officer is, absent truly exigent circumstances, an important element of reasonableness. Usually such a warrant must specify the address of a single location, or several particular locations, to be searched. If, however, this level of specificity is, for good reasons, not practical, it is reasonable to describe the place to be searched differently. Such a description may leave some discretion in the executing officers, if this is not likely

to result in mistaken, unjustified intrusions and is necessary to both maintain the requirement of prior judicial approval and to accommodate legitimate, important needs of law enforcement.

As set forth below, the roving intercept provisions, as implemented by the Order in this case, fully meets this test.

5. The roving intercept provision is constitutional as applied in the context of the Order in this case.

As set forth below, the roving intercept provision as applied by the Order in this case authorized a search and seizure which was reasonable, and which was made pursuant to a warrant that, among other things, satisfied the

particularity clauses of the Fourth Amendment. Section § 2518(11)(a) is, therefore, constitutional as applied here.

Although the defendants make expansive claims concerning the invasion of their privacy in this case, they only have standing to complain concerning the capture of their conversation. They did not have any legitimate interest in the privacy of the Distefano's residence at 34 Guild Street before they arrived there. Thus, they lack standing to assert that the entry to install listening devices injured their rights. See United States v. Volpe, 430 F. Supp. 931, 945 (D.Conn. 1977), aff'd, 578 F.2d 1372 (2d Cir. 1978), cert. denied, 441 U.S. 930, 60 L. Ed. 2d 658, 99 S. Ct. 2049 (1979); see also, J. Carr, The Law of Electronic

Surveillance § 6.2(b)(3) at 6-36.1 (1990).

More specifically, as the Supreme Court observed in Karo:

> A "search" occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed" United States v. Jacobsen, 466 U.S. 109, 113, 80 L. Ed. 2d 85, 104 S. Ct. 1652 (1984). . . . A "seizure" of property occurs when 'there is some meaningful interference with an individual's possessory interest in that property." Ibid.

468 U.S. at 712. The defendants had no possessory interest or reasonable expectation of privacy concerning 34 Guild Street before they arrived there on October 29, 1989.[7]

---

[7]The entry at 34 Guild Street was, in any event, authorized by the Warrant and permissible as necessary to implement the justified authorization to intercept certain conversations. See Dalia v. United States, 441 U.S. 238, 60 L. Ed. 2d 177, 99 S. Ct. 1682 (1979).

The Fourth Amendment does, however, apply to the defendants' conversations while at 34 Guild Street because individuals legitimately expect that their conversations while in the homes of others will be private and society is prepared to recognize such expectations as reasonable. See Minnesota v. Olson, 495 U.S. 91, 110 S. Ct. 1684, 1687, 109 L. Ed. 2d 85 (1990); Katz, 389 U.S. at 361 (Harlan, J., concurring).

The interception of an oral discussion is, of course, a "search and seizure." Berger, 388 U.S. at 51. The first and fundamental question then is whether that search and seizure was reasonable. T.L.O., 469 U.S. at 340. This "requires 'balancing the need to [*] search against the invasion which the search

entails.'" Id. at 337 (quoting Camara, 387 U.S. at 536-37).

In this case, the invasion was in one important sense most serious -- its purpose and effect was to obtain evidence to be used against the subjects of the search in a criminal prosecution. In addition, if it is assumed that associational activity enjoying First Amendment protection was also implicated, the burden imposed by the intrusion is magnified.

Nevertheless, the search and seizure at issue -- the interception of the Mafia induction ceremony -- was reasonable. As Congress expressly recognized in enacting Title III, organized crime presents a serious threat to our society and the ability to intercept communications is indispensable to combating organized

crime. In this case, Title III was utilized to serve its major purpose, investigating serious crimes -- including a RICO conspiracy allegedly involving murder, drug trafficking, and obstruction of justice -- by organized criminals. See United States v. Kahn, 415 U.S. 143, 151, 39 L. Ed. 2d 225, 94 S. Ct. 977 (1974).

This is not a case where there is any suggestion that the defendants were targeted because of their political or religious beliefs. Nor was the search aimed at obtaining their publications. Zurcher v. Stanford Daily, 436 U.S. 547, 564, 56 L. Ed. 2d 525, 98 S. Ct. 1970 (1978); Stanford v. Texas, 379 U.S. 476, 482, 13 L. Ed. 2d 431, 85 S. Ct. 506 (1965).

In addition, the activity at issue here did not involve an invasion of any

defendant's home or office.[8] In this case, the government did not intrude upon any defendant's most personal, private space. Indeed, the defendants evidently chose 34 Guild Street because they had no prior association with it and thus hoped to evade detection. Therefore, in balancing the competing considerations to determine reasonableness, the value to be attributed to defendants' expectation of privacy is diminished. See United States v. Torres, 751 F.2d 875, 883 (7th Cir. 1984) [**83] cert. denied, 470 U.S.

---

[8]The balancing concerning reasonableness might be different if the government's efforts concerning 34 Guild Street had generated evidence to be used against its residents, the DiStefanos. See Steagald, 451 U.S. at 211-16.

1087, 85 L. Ed. 2d 150, 105 S. Ct. 1853 (1985).[9]

The fact that the roving interception was conducted pursuant to a warrant also militates in favor of its reasonableness. The judgment as to whether this extraordinary investigative technique was necessary and appropriate was made by an independent judge, rather than by "the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14, 92 L. Ed. 436, 68 S. Ct. 367 (1948). [**84] As described below, the warrant at issue is conventional in every respect

---

[9]In Torres, the court stated: "A safe house is not a home. No one lives in these apartments, amidst the bombs and other paraphernalia of terrorism. They are places dedicated exclusively to illicit business . . . . There is no right to be let alone while assembling bombs in safe houses". 751 F.2d at 883.

except its description of the place to be searched. This exception would be justified if a judge properly found it was impractical to describe the place to be searched in the customary fashion, particularly if that conclusion was based upon a showing that the targeted individuals were structuring their communications to thwart surveillance.

Defendants correctly contend that in this case once the roving intercept order was issued, there was no express limitation on the number of places in which the government could install listening devices based upon executive, rather than judicial, branch decisions that there was a proper basis to do so. This theoretical potential for a large number of entries and installations, however, does not render the searches and

seizures authorized by the Order in this case unreasonable.

First, while the statute does not impose a general requirement that a roving intercept order limit the number of intrusions permitted, there are practical constraints which operate to impose such limits. Electronic [*1294] surveillance is difficult, labor intensive, and expensive. The government's capacity to utilize it is finite.

In addition, the Supreme Court has, in effect, put the government on notice that the discretion granted by a roving intercept order should be exercised with restraint because it has stated that searches and seizures pursuant to warrants will be invalidated if they are executed in an unreasonable manner.

Dalia, 441 U.S. at 257 ("It is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by a warrant -- subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'") (footnote omitted).

In any event, the Order in this case contained provisions to minimize the risk that the roving authority it granted could be abused. The Order required that the court be notified in advance of any surreptitious entry, or as soon as possible thereafter if prior notice was not feasible Order, p. 6. This procedure permitted the judge to revoke or revise the roving intercept Order if he perceived that the government was attempting too many intrusions, or

seeking interceptions at sensitive locations such as religious institutions or political offices. Dalia, 441 U.S. at 258.

In addition, the Order required the government to file reports every seven days to show what had occurred and to seek to establish the need for the continuation of the roving authority. Order, p. 7. Thus, the Order provided regular opportunities for the court to review, and if appropriate revise or revoke, the warrant. In addition, the Order by its terms expired after 30 days, unless extended pursuant to § 2518(5). Id. at 5.

As a practical matter, if an Order similar to that issued in the instant case were not obtainable in advance of an interception, the government would be

encouraged to engage in electronic surveillance of organized crime without a warrant when it learned of the location of an important meeting shortly before it was scheduled to occur. See § 2518(7)(a)(iii). Such warrantless surveillance presents a greater risk to Fourth Amendment rights than the roving interception authorized here. See Karo, 468 U.S. at 718.

Thus, balancing the foregoing factors, the court concludes that the search and seizure authorized by the roving intercept provisions of Title III, as implemented by the court's Order, was reasonable. Thus, the Fourth Amendment's fundamental test has been satisfied.

In addition, that Order also satisfies that requirements of the warrant clause of the Fourth Amendment. In this case,

the government obtained a warrant for the interception defendants now seek to suppress. That warrant was based upon a strong showing of probable cause to believe that the proposed targets of the electronic surveillance and their alleged co-conspirators were engaging in the type of serious crimes which must be involved to obtain a warrant pursuant to Title III. See §§ 2516(1)(c) and 2518(1)(b); Steffens Aff., 11-56. The information presented to the judge also amply indicated that there was probable cause to believe that particular communications concerning those offenses would be obtained through the interceptions authorized. § 2518(3)(b).

In addition, § 2518(11)(a) does not in any way alter the usual Title III specification requirement concerning the

"thing to be seized." Title III requires for both roving and regular electronic surveillance "details as to the particular offense that has been, is being, or is about to be committed [and] . . . a particular description of the type of communications sought to be intercepted." § 2518(1). In this case the Order used a usual form of specifying such communications, providing for the interception of "oral communications made by, directed to, and/or in the presence of JOSEPH A. RUSSO, VINCENT M. FERRARA, and/or ROBERT F. CARROZZA," concerning the nature and extent of certain gambling businesses, the use of interstate facilities in such businesses, the use of murder, including the murder of William Grasso, in the conduct of a racketeering enterprise, and [*1295] the roles of

the targets and others in that enterprise. Order at p. 3-5. As numerous courts have found, the pertinent provisions of Title III satisfy the Fourth Amendment requirement that the thing to be seized be particularly described. See United States v. Gambale, 610 F. Supp. 1515, 1537 (D.Mass. 1985) aff'd on other grounds sub nom. United States v. Angiulo, 847 F.2d 956 (1st Cir. 1988), cert. denied, 488 U.S. 928, 109 S. Ct. 314, 102 L. Ed. 2d 332 (1988); United States v. Dorfman, 542 F. Supp. 345, 385 n. 41 (N.D. Ill. 1982) (citing cases), aff'd sub nom. United States v. Williams, 737 F.2d 594 (7th Cir. 1984), [**89] cert. denied, 470 U.S. 1003, 84 L. Ed. 2d 377, 105 S. Ct. 1354 (1985). This conclusion is equally apt in the context of the Order in this case.

Defendants most arduously assert, however, that the roving intercept provisions of Title III fail to satisfy the requirement that a warrant particularly describe the place to be searched. It should be noted, however, that the Fourth Amendment does not state that a warrant must contain an address, although this is usually included. Rather, as indicated earlier, the Supreme Court has found that, "it is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended." Steele, 267 U.S. at 503. "Obviously the primary purpose of this limitation is to minimize the risk that officers executing search warrants will by mistake search a place other than the place intended by the Magistrate." 2 W.

LaFave, Search and Seizure § 4.5, at 207 (2d ed. 1987).

Like the other provisions of the Fourth Amendment, the requirement that the place or person to be searched be particularly described has been interpreted flexibly, depending on the circumstances. United States v. Muckenthaler, 584 F.2d 240, 245 (8th Cir. 1978). In Muckenthaler, the government had probable cause to believe that several people arriving at an airport on a particular flight would be delivering cocaine to a man named Struble. The government could not, however, ascertain their names or describe their luggage. Id. at 245-46. A search warrant was issued for "those persons or baggage 'being met' by Struble." Id.

The court analyzed the adequacy of this warrant, stating:

> The constitutional standard for particularity of description in a search warrant is met if the description is sufficiently definite so as to enable the officer with the warrant to reasonably ascertain and identify the place to be searched and the objects to be seized. Steele, 267 U.S. at 503-04; United States v. Davis, 557 F.2d 1239, 1248 (8th Cir.), cert. denied, 434 U.S. 971, 54 L. Ed. 2d 461, 98 S. Ct. 523 (1977); United States v. Johnson, 541 F.2d 1311, 1313 (8th Cir. 1976). Accordingly, the degree of specificity is flexible depending upon the circumstances and the type of items involved. United States v. Davis, 542 F.2d 743, 745 (8th Cir.), cert. denied, 429 U.S. 1004, 50 L. Ed. 2d 616, 97 S. Ct. 537 (1976). The underlying measure of adequacy in the description is whether, given the specificity in the warrant, a violation of personal rights is likely. Johnson, supra at 1313.

Id. at 245. Applying this standard, the court in Muckenthaler found the warrant to be constitutional because it "was as specific as possible under circumstances." Id.

This conclusion is equally applicable here. As indicated earlier, in contrast to a conventional Title III warrant, the roving intercept provision requires identification of the person committing the offense and whose conversation is to be intercepted. Compare §§ 2518(11)(a)(ii) and 2518(1)(b)(iv) (requiring the identity of the person, if known). Thus, § 2518(11)(a)(ii) provides for defining the place to be searched as the location at which an identified person is discussing specified crimes. Such a description is constitutionally sufficient in the context of this case.

Also as indicated earlier, the statute does not permit an interception until the "the place where, the communication is to be intercepted is ascertained." § 2518(12). The Order in this case provided

that no interception was permissible until Russo, Carrozza or [*1296] Ferrara was present. Order, p. 6. In addition, the government was required to employ standard minimization procedures to assure that only criminal conversation was intercepted. § 12518(5).

In this case, and the court expects in most roving intercept cases, the subjects of the surveillance had long been under investigation and were well known to the FBI. See Steffens Aff. It is, therefore, unlikely that a mistake would have been made about whether one of them was present for a conversation. The FBI also had considerable information concerning individuals believed to be the targets' criminal associates. Id. Thus, while the exercise of some discretion was required with regard to the intercept, the

government could with "reasonable efforts," Steele, 267 U.S. at 503, ascertain the place where the targets were likely to be conducting the criminal conversations the government was authorized to intercept.

Similarly, the government could without significant risk of mistake identify the locations at which listening devices would have to be installed. Indeed, no mistake was made in this case.

Accordingly, the court concludes that the purpose to be served by the requirement that the place to be searched be particularly described was satisfied by the roving intercept provision as implemented by the Order in this case. The customary specification by means of an address was lacking, but this was permissible if the judge properly found

that it was impractical to provide this information and that electronic surveillance was otherwise justified.

This conclusion represents the recognition that crime changes in response to law enforcement efforts to combat it and the Fourth Amendment "must be interpreted 'in light of contemporary' norms and conditions." Steagald, 451 U.S. at 217 n. 10, (quoting Payton, 445 U.S. at 591 n. 33). The decisions in Berger and Katz recognized that warrants for electronic surveillance could suffice if they were similar, but not identical to customary warrants. The Supreme Court has reiterated and elaborated this principle of flexibility regarding warrants. Karo, 468 U.S. at 705; Almeida-Sanchez, 413 U.S. at 266; Camara, 387 U.S. at 523. The roving intercept provision allows a

departure from the customary description of the place to be searched when the usual specificity is shown to be impractical. In the context of this case at least, the provision satisfies the standards of the Fourth Amendment.

This analysis and conclusion is consistent with the sole district court decision addressing the constitutionality of the roving wiretap provision of Title III, §§ 2518(11)(b). Silberman, 732 F. Supp. 1057. In Silberman the court observed that "the purpose of the Fourth Amendment's particularity requirement is to ensure that a search 'will be carefully tailored to its justifications, and will not take on the character of the wide ranging exploratory searches the Framers intended to prohibit." Id. at 1061 (citing Maryland v. Garrison, 480

U.S. 79,, 94 L. Ed. 2d 72, 107 S. Ct. 1013 (1987)). The court recognized that the roving wiretap provision relaxed the usual specificity of the description of the places to be searched when a target was shown to be attempting to evade detection. Id. at 1062. In these circumstances, the court found the roving wiretap provision, in the context of Title III's many other protections, to be constitutional because it "sufficiently tailors the search it authorizes to its need." Id. at 1063. This conclusion is equally applicable to the roving intercept provision at issue in this case.

6. Even if the roving intercept provision is unconstitutional, the good faith exception to the exclusionary rule

defeats the motion to suppress if the Warrant in this case was properly obtained.

As described in Section IV.1 infra, the judicially crafted exclusionary rule relating to Fourth Amendment violations applies to the execution of the roving intercept Order in this case. This exclusionary rule now includes an exception for objectively [*1297] reasonable reliance by a law enforcement officer upon a statute, or upon a warrant if it has been properly obtained. Illinois v. Krull, 480 U.S. 340, 94 L. Ed. 2d 364, 107 S. Ct. 1160 (1987); United States v. Leon, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984).

In the instant case, the FBI reasonably relied on the validity of the roving intercept provisions of Title III

and on the warrant received pursuant to those provisions. Therefore, if the manner in which the warrant was obtained does not require suppression, the good faith exception to the exclusionary rule would operate to defeat defendants' motion to suppress the fruits of the electronic surveillance at 34 Guild Street even if the roving intercept provision of Title III was now deemed unconstitutional.

In 1984, the Supreme Court decided United States v. Leon, which explicitly established a good faith exception to the judicially crafted exclusionary rule for Fourth Amendment violations in the context of law enforcement officers executing warrants issued based upon mistaken findings by a magistrate of probable cause. Leon, 468 U.S. at 913.

The exception was based in part on the Supreme Court's view that:

> Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants [by application of the exclusionary rule] offends basic concepts of the criminal justice system.

Id. at 907-08 (citing Stone v. Powell, 428 U.S. 465, 490, 49 L. Ed. 2d 1067, 96 S. Ct. 3037 (1976)).

In 1987, the Supreme Court extended the good faith exception to the exclusionary rule to warrantless searches based upon statutes later declared unconstitutional. Krull, 480 U.S. at 349. Krull involved a warrantless administrative search of an automobile wrecking yard pursuant to an Illinois statute authorizing such searches. Id. at 342-43. The search generated evidence

which the government wished to use in a criminal prosecution. Id. at 344. Although the statute at issue was declared to violate the Fourth Amendment, the evidence was not suppressed. Id. at 359-60.

In deciding Krull, the Supreme Court explained it should be presumed that legislators act in a constitutional manner and, therefore, laws should be accorded a presumption of constitutional validity. Id. at 351. Thus, "unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law." Id. at 349-50.

However, "a law enforcement officer [cannot] be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable

officer should have known the statute was unconstitutional." Id. at 355; see Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). Moreover, "the standard of reasonableness . . . is an objective one; the standard does not turn on the subjective good faith of the individual officers." Krull, 480 U.S. at 355 (citing Leon, 468 U.S. at 919 n. 20).

As the Supreme Court expressly recognized in Krull, applying the good faith exception to the exclusionary rule to reasonable reliance on statutes is inconsistent with some of its earlier rulings, including its decision in Berger. Id. at 355-56 n. 12. As the Court stated, however, those cases preceded Leon. Id. In Krull, the Court indicated that any prior inconsistent decisions

regarding reliance upon a statute were effectively overruled. See Krull, 480 U.S. at 364 (O'Connor, J., dissenting).

In this case, the interception of conversations was authorized by the Warrant, which was issued pursuant to the presumptively constitutional provisions of § 2518(11)(a). The agents' reliance on the Warrant and, implicitly, on the statute was reasonable. The roving intercept provisions of Title III are not "clearly unconstitutional." Indeed, this court finds them to [*1298] be compatible with the requirements of the Fourth Amendment. In any event, there were no cases addressing the constitutionality of § 2518(11)(a) at the time the FBI executed the Order in this case and it certainly cannot be said that

the agents involved should have known the statute was unconstitutional.

This, however, is not the end of the inquiry concerning the issue of suppression of the communications intercepted at 34 Guild Street. As the Supreme Court explained in Leon, when warrants are involved, the good faith exception to the exclusionary rule relies substantially on the efficacy and integrity of the warrant process. 468 U.S. at 914. In Leon, the Court again emphasized the importance of a warrant generally, stating:

> Because a search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime'" United States v. Chadwick, 433 U.S. 1, 9, 53 L. Ed. 2d 538, 97 S. Ct. 2476 (1977) (quoting Johnson, 333 U.S. at 14), [the Court has] expressed a strong

> preference for warrants and declared that "in a doubtful or marginal case a search under a warrant may [**100] be sustainable where without one it would fail." United States v. Ventresca, 380 U.S. 102, 106, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965).

Id. at 913-14.

The Court also plainly indicated, however, that it is essential that the judicial officer perform his or her neutral and detached function of deciding on a properly informed basis whether a warrant should issue. Id. at 914. Therefore, the good faith exception to the exclusionary rule "does not preclude inquiry into the knowing and reckless falsity" of the information furnished by the government to obtain the warrant. Id. (citing Franks v. Delaware, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978)). "Indeed, 'it would be an unthinkable imposition upon [the judicial officer's]

authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment." Id. at 914 n. 12 (quoting Franks, 438 U.S. at 165). Accordingly, "(a) warrant that violates Franks is not subject to the good faith exception to the exclusionary rule announced in [Leon]." United States v. Colkley, 899 F.2d 297, 300 (4th Cir. 1990).

It is, therefore, essential that the court address the most vexing of the many challenging issues presented by defendants' motion to suppress --the question whether suppression is required because the government failed to inform Judge Nelson of the information it had received concerning 34 Guild Street.

IV. Suppression On The Basis Of Alleged Statutory Violations Is Not Justified.

1. Issues relating to 34 Guild Street must be analyzed under the standards of Franks v. Delaware.

The issue whether to suppress the intercepted evidence concerning the Mafia induction ceremony at 34 Guild Street is challenging in part because of some uncertainty concerning the standards to be utilized in deciding this question. As set forth below, analysis indicates that for the provisions of Title III which address requirements of the Fourth Amendment, the evolving constitutional law concerning suppression is applicable. Section 2518(11)(a)(ii) addresses the particularity clause of the Fourth Amendment and, therefore, constitutional

standards concerning exclusion apply to issues relating to it. These standards include those established by Franks v. Delaware. As explained in Section IV.2, infra, suppression is not justified pursuant to Franks.

As described in Section III.3, supra, Title III contains certain provisions intended to implement commands of the Fourth Amendment. The statute also includes many other provisions which go beyond constitutional requirements. Over time, the distinction between these provisions [*1299] has come to make a difference concerning the applicable exclusionary rules.

18 U.S.C. § 2515 provides that intercepted oral communications are not admissible at "any trial, hearing, or other proceeding . . . if the disclosure

of that information would be in violation of [TItle III]." A remedy for a violation of rights established by Title III is provided by § 2518(10)(a)(i), which requires suppression if the communication at issue "was unlawfully intercepted." See United States v. Mora, 821 F.2d 860, 865 (1st Cir. 1987) ("Congress explicitly intended that § 2518(10)(a) provide the remedy for the right created by § 2515.").

When enacted in 1967, §§ 2515 and 2518(10)(a) were not intended "generally to press the scope of the suppression role beyond [then] present search and seizure law." 1968 Leg. Hist. at 2185; Scott v. United States, 436 U.S. 128, 139, 56 L. Ed. 2d 168, 98 S. Ct. 1717 (1978); United States v. Orozco, 630 F. Supp. 1418, 1522 n. 9 (S.D. Cal. 1986).

At that time, there was no good faith or other exception to the judicially crafted exclusionary rule applicable to violations of the Fourth Amendment. When enacted, the primary purpose and effect of §§ 2515 and 2518(10) was to extend the exclusionary rule beyond federal criminal trials to cover federal civil actions, state criminal and civil proceedings, and federal and state grand jury proceedings. 1968 Leg. Hist. at 2185 (§ 2518 applies "across the board in both Federal and State proceeding"); United States v. Giordano, 416 U.S. 505, 528 n. 17, 40 L. Ed. 2d 341, 94 S. Ct. 1820 (1974). It was expected that, "along with the criminal and civil remedies [of Title III § 2515] would serve to guarantee that the standards [of the statute] will sharply curtail the unlawful interception of wire

and oral communications." 1968 Leg. Hist. at 2185; Giordano, 416 U.S. at 514 n. 6.

In 1974, the supreme Court recognized that Title III included provisions which enacted in statutory form certain Fourth Amendment imperatives and also included additional requirements intended to impose limits on the use of electronic surveillance which were not mandated by the Fourth Amendment. See Giordano, 416 U.S. at 524. In Giordano, the intercepted evidence at issue was suppressed because the request for a warrant had been approved by an official of the Department of Justice who was not, under the statute, authorized to act for the Attorney General with regard to wiretaps.

The statutory requirement that only certain officials of the Department of Justice approve requests to seek warrants

for wiretaps is not based upon any obligation imposed by the Fourth Amendment. Consistent with this understanding, in addressing the question of suppression, the Court emphasized that, "the issue does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III." Id. Justice Lewis Powell was more explicit in his concurrence and dissent, stating that, "to the extent that the statutory requirements for issuance of an intercept order are nonconstitutional in nature, the exclusionary rule adopted to effectuate the Fourth Amendment does not pertain to their violation." Id. at 558. The clear implication of these remarks is that for statutory requirements which are

constitutional in nature, the judicially fashioned exclusionary rule must be applied.

In Giordano, the Court held that the words "unlawfully intercepted" were not limited to constitutional violations and that:

> Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.

Id. at 527 (emphasis added). In doing so, the Court in effect found legislative intent to require suppression without regard to the government's good faith or the absence of prejudice to a defendant if certain statutory provisions of Title III not rooted in the requirements of the Fourth Amendment were not satisfied.

[*1300] In 1977, the Court again recognized the distinction between provisions of Title III which reflect constitutional commands and those which are solely legislative in origin. United States v. Donovan involved the failure of the government to identify, as required by § 2518(1)(b)(iv), every person it had probable cause to believe would be intercepted in criminal conversation if a wiretap was authorized. 429 U.S. 413, 97 S. Ct. 658, 50 L. Ed. 2d 652 (1977). The Court noted that, "it is not a constitutional requirement that all those likely to be overheard engaging in incriminating conversations be named." Id. at 427 n. 15. Thus, the Court found, "the availability of the suppression remedy for these statutory, as opposed to constitutional, violations, . . . turns

on the provisions of Title III rather than the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights." Id. at 432-33 n. 22. In doing so, the Court clarified that violations of a constitutional magnitude would be governed by the judicially fashioned exclusionary rule.

In Donovan, the Court went on to find that in contrast to the approval provisions implicated in Giordano, the naming provision at issue did not "play 'a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance.'" Id. at 437 (quoting United States v. Chavez, 416 U.S. 562, 578, 40 L. Ed. 2d 380, 94 S. Ct. 1849 (1974)). Thus, the Court declined to find the interception

"unlawful," because, "in no meaningful sense can it be said that the presence of that information as to additional targets would have precluded judicial authorization of the intercept." Id. at 436.

The Court in Donovan, however, was careful to state that it was not called upon to decide a case in which there was a suggestion that government agents knowingly withheld the names at issue "for the purpose of keeping relevant information from the District Court that might have prompted the court to conclude that probable cause was lacking" and, therefore, that the warrant should not issue. Id. at 436 n. 23. Thus, the Supreme Court suggested that an intentional effort to withhold material information might justify suppression.

Similarly, the Supreme Court found it worthy of note that the defendants in Donovan were not prejudiced by "their failure to receive postintercept notice." Id. at 439 n. 26.

In 1977, the Court of Appeals for the First Circuit addressed the implications of a failure to furnish the district court with the names of individuals overheard on a wiretap who were entitled to notice of the interception under § 2518(8)(d). United States v. Harrigan, 557 F.2d 879 (1st Cir. 1977). Following Donovan, the First Circuit found that § 2518(10)(a) did not require the suppression of wiretap evidence because the duty which had been violated was imposed by a non-central, statutory provision. Id. at 882.

The Court of Appeals suggested, however, that the result would be different if a defendant could demonstrate incurable prejudice from not receiving notice. Id. at 884. In addition, the First Circuit observed that Donovan left open the question whether the intentional withholding of information might justify suppression, and indicated in dicta that, "suppression should be required when the statutory violation arose from a conscious decision by the federal authorities to violate the law."[10] [*1301] Thus, in Harrigan,

---

[10]In Harrigan, the First Circuit cited with approval the Ninth Circuit's decision in United States v. Chun, 503 F.2d 533 (9th Cir. 1974). 557 F.2d at 884. In Chun, the Ninth Circuit stated that in deciding whether suppression was justified for a violation of a non-central provision of Title III:
Chavez and Giordano suggest that there are several important factors which
(continued...)

[10](...continued)
should be considered. As an initial matter, it must be determined whether the particular procedure is a central or functional safeguard in Title III's scheme to prevent abuses. Chavez, supra, 416 U.S. at 578, 94 S. Ct. 1849; Giordano, supra, 416 U.S. at 516, 94 S. Ct. 1820. If this test has been met, it must also be determined whether the purpose which the particular procedure was designed to accomplish has been satisfied in spite of the error. Chavez, supra, 416 U.S. at 573-574, 94 S. Ct. 1849; Giordano, supra, 416 U.S. at 524-528, 94 S. Ct. 1820. While in most situations it would not be necessary to reach beyond the above-mentioned factors, it may be that in some instances they will not be completely determinative. In such cases, Chavez implicitly suggests a third factor which may have a bearing on the issue -- i.e. whether the statutory requirement was deliberately ignored; and if so whether there was any tactical advantage to be gained thereby.

Chun, 503 F.2d at 542 (emphasis added). This test relating to non-central provisions has also been adopted in several other Circuits. See United States v. Caggiano, 667 F.2d 1176, 1179 (5th Cir. 1982); United States v. Diana, 605 F.2d 1307, 1312 (4th Cir. 1979) cert. denied, 444 U.S. 1102, 62 L. Ed. 2d 787, 100 S. Ct. 1067 (1980); United States v. Lawson, 545 F.2d 557, 564 (7th Cir.
(continued...)

the First Circuit suggested that a deliberate effort to withhold immaterial information might justify suppression.

Subsequently, District Judge W. Arthur Garrity, Jr. of Massachusetts, again in dicta, suggested that a reckless failure to comply with a non-central provision might be sufficient to trigger suppression. United States v. Sullivan, 586 F. Supp. 1314, 1323 (D. Mass. 1984). The First Circuit has not decided whether proving reckless disregard is sufficient to obtain suppression for a violation of a non-central provision, but has determined that "mere negligence" is not

---

[10](...continued)
1975); United States v. Civella, 533 F.2d 1395, 1400-01 (8th cir. 1976), cert. denied 430 U.S. 905, 51 L. Ed. 2d 581, 97 S. Ct. 1174 (1977); see also Scott v. United States, 573 F. Supp. 622, 627 (M.D. Tenn. 1983); J. Carr, supra, § 6.3(a), p. 6-71.

enough. United States v. Zannino, 895 F.2d 1, 9 (1st Cir. 1990).

Shortly after Harrigan was decided, in 1978, the Supreme Court found that even if law enforcement officers failed to make a good faith effort to comply with the minimization requirements established by § 2518(5), suppression was not appropriate if the facts and circumstances indicate the agents reasonably intercepted all calls on a particular telephone. Scott v. United States, 436 U.S. 128, 139, 56 L. Ed. 2d 168, 98 S. Ct. 1717 (1978). This conclusion was based, in part, on the terms of § 2518(5), in which the use of the word "conducted" was interpreted as indicating a legislative intent that the focus be on the agents' actions rather than their motives. Id.

More importantly, at the time Harrigan was decided in 1977, there had been no meaningful alteration of the judicially fashioned exclusionary rule since the enactment of Title III and, therefore, no possible distinction between the standards of that rule and of the statutory exclusionary rule embodied in § 2518(10)(a). In 1978, however, the Supreme Court decided Franks v. Delaware.

Although Franks was not a Title III case, it directly addressed the circumstances in which evidence should be suppressed if it were alleged that the government had presented false information in an affidavit to persuade a judge that there was probable cause for the issuance of a warrant. In Franks, the Court held that:

> In the event that . . . the allegation of perjury or reckless

> disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Franks, 438 U.S. at 156. The Court, therefore, established that when Franks applies a defendant must satisfy two requirements to obtain suppression based upon possible governmental misconduct in connection with obtaining a warrant: first, that the information at issue was known by the government to be false or was presented with reckless disregard for its truth; and second that the information was essential to the issuance of the warrant. By this formulation, the Court implicitly established a good faith exception to the judicially fashioned

exclusionary rule applicable to alleged violations of the Fourth Amendment's requirement that a judicial officer properly find probable cause to issue a warrant.

In his 1974 concurrence and dissent in Giordano, Justice Powell foreshadowed the ruling in Franks and indicated that at least the second prong of that standard [*1302] should be applied in determining the question of suppression for a violation of a provision of Title III which implements a constitutional requirement, such as a finding of probable cause. More specifically, in Giordano Justice Powell "agreed with the majority that the authorization by the Executive Assistant to the Attorney General of the application for the [original] interception order contravened

18 U.S.C. § 2516(1) and that the statutory remedy is suppression of all evidence derived from interceptions made under that order." Giordano, 416 U.S. at 548 (emphasis added). Justice Powell, however, dissented with regard to the suppression of evidence obtained as a result of properly authorized extensions of the original wiretap because, putting aside all evidence obtained from the invalid original wiretap order, the independent and untainted evidence submitted to the district court established probable cause. Id. at 549, 558-61.

Justice Powell's view in Giordano is significant in the context of the instant case because it signaled that the standards later established by Franks should be applied to questions of

suppression arising from alleged violations of provisions of Title III which enact Fourth Amendment requirements. This is consistent with the position which has been adopted by the Court of Appeals for the First Circuit.[11] See United States v.

---

[11]The issues presented by the motion to suppress the electronic surveillance of 34 Guild Street in the instant case are also being litigated in the District of Connecticut, where the government seeks to use the same evidence in the prosecution of United States v. Bianco, et al., No. H-90-18. This court believes that the law as interpreted by the Court of Appeals for the First Circuit is likely to be applied to issues relating to the electronic surveillance of 34 Guild Street which are raised in Bianco because the conduct in question occurred within the First Circuit. See United States v. Gerena, 667 F. Supp. 911 (D.Conn. 1987).

It should be recognized, however, that courts within the Second Circuit have, like those in the First Circuit, utilized the standards of Franks to determine whether to suppress electronic surveillance evidence when it is claimed that a warrant was obtained improperly.

(continued...)

Southard, 700 F.2d 1 (1st Cir. 1983), cert. denied, Ferris v. United States,

---

[11](...continued)
See United States v. Feola, 651 F. Supp. 1068, 1108, 1113 (S.D.N.Y. 1987) (applying Franks concerning issues regarding probable cause and exhaustion of alternative means of investigation) aff'd, 875 F.2d 857 (2d Cir. 1989), cert. denied, Marin v. United States, 110 S. Ct. 110, 107 L. Ed. 2d 72 (1989); United States v. Tufaro, 593 F. Supp. 476, 485-86 S.D.N.Y. 1983) (applying Franks to omission of allegedly material fact concerning probable cause) aff'd, 762 F.2d 991 (2d Cir. 1985), cert. denied, 474 U.S. 826 (1985); United States v. Ramirez, 602 F. Supp. 783, 788-89 (S.D.N.Y. 1985).

Franks has also been applied in Title III cases in other Circuits. See e.g., United States v. Garcia, 785 F.2d 214, 222 (8th Cir. 1986); United States v. Leisure, 844 F.2d 1347, 1357 (8th Cir. 1988); United States v. Ippolito, 774 F.2d 1482, 1485 (9th Cir. 1985); United States v. Brooklier, 685 F.2d 1208, 1221 (9th Cir. 1982) (per curiam), cert. denied 459 U.S. 1206, 75 L. Ed. 2d 439, 103 S. Ct. 1194 (1983). United States v. Marcello, 508 F. Supp. 586, 603-06 (E.D.La. 1981), aff'd sub nom. United States v. Roemer, 703 F.2d 805 (5th Cir.), cert. denied, 464 U.S. 935 (1983); J. Carr., supra § 6.2(d)(1)(A), p. 6-56 ("The Franks standard applies to Title III applications and orders.").

464 U.S. 823, 78 L. Ed. 2d 97, 104 S. Ct. 89 (1983).

In Southard, the defendants alleged that a government affidavit submitted to obtain a wiretap falsely stated that informant information established probable cause to believe criminal conversations would be captured. Id. at 7. The Court of Appeals applied the Franks standard to analyze defendants' claim. Id. at 7-10. The motion to suppress was denied because the court found an allegedly false statement concerning unidentified callers to be true, id. at 9, and appellants failed to make the substantial preliminary showing with regard to allegedly false statements relating to informants which was necessary to obtain an evidentiary

hearing, let alone prove bad faith. Id. at 10.

As described earlier, following the decision in Southard, in 1984, the Supreme Court decided Leon. Leon explicitly established a good faith exception to the judicially crafted exclusionary rule for Fourth Amendment violations and expressly anticipated reliance on Franks when challenges are made to an application and affidavit [*1303] seeking a warrant. Leon, 468 U.S. at 914.

As a result of Franks and Leon, by 1984 there had been considerable evolution of the judicially crafted exclusionary rule applicable to Fourth Amendment violations since the enactment of the statutory exclusionary rule in 1967 as part of Title III. Thus, a

question was presented whether the current constitutional exclusionary rule or the 1967 standards would be applied in particular Title III cases.

In 1984, shortly after Leon was decided, the Court of Appeals for the First Circuit indicated again that the current constitutional exclusionary rule standards apply to at least some Title III cases, including those in which the issue is whether a warrant was properly obtained. United States v. Mastroianni, 749 F.2d 900, 909 (1st Cir. 1984). Mastroianni involved an alleged misrepresentation in a state wiretap application pursuant to a Massachusetts statute that paralleled § 2518(c), which requires that an application for a warrant contain a full and complete statement of why other investigative

techniques had failed or were not likely to succeed. Id. at 908; see Mass. Gen. Laws Ann. ch. 272, § 99(E)(3) (West 1990). More specifically, although a member of the conspiracy being investigated had agreed to cooperate five days earlier, the affiant stated that "as of this date efforts to successfully penetrate this organization and other investigative techniques have failed." Mastroianni, 749 F.2d at 908.

As indicated earlier, the "necessity" requirement of § 2518(1)(c) is rooted in the Fourth Amendment requirement that searches be reasonable and in the statements in Berger and Katz that courts should authorize "no greater invasion of privacy . . . than necessary under the circumstances." Berger, 388 U.S. at 57; Katz, 389 U.S. at 355. In analyzing a

violation of the comparable necessity provision of the state statute, the Court of Appeals for the First Circuit employed the Franks test to determine whether the wiretap evidence at issue ought to be suppressed. Mastroianni 749 F.2d at 909.

The court in Mastroianni stated that it had "serious reservations about whether a magistrate would have approved the wiretap application when he did if he had been aware of [the informant's] apparent decision to cooperate." Id. at 909 n. 6. The evidence was not excluded, however, because the information concerning the cooperating individual was relatively recent, had not been communicated to the affiant, and therefore the statement at issue was not shown to have been made "with knowledge of its falsity or with reckless disregard

for the truth." Id. at 909. Thus, the First Circuit relied on the good faith prong of the Franks test to deny suppression in a case where the warrant would apparently not have issued, and the defendant would not have been intercepted, if the issuing magistrate had been fully informed.

In 1986, the Court of Appeals for the First Circuit again applied the Franks standard in the context of deciding a motion to suppress for an alleged violation of the statutory requirement of § 2518(1)(c) that the government make a full and complete statement regarding the efficacy of other investigatory techniques in order to show that a wiretap is necessary. United States v. Cole, 807 F.2d 262, 267 (1st Cir. 1986), cert. denied, 481 U.S. 1069, 95 L. Ed. 2d

870, 107 S. Ct. 2461 (1987). In Cole, the government failed to inform the court that one of its investigators was having an affair with a co-defendant and thus had access to certain information. Id. After a hearing, the district court held that the second prong of the Franks test was not satisfied, finding that the omitted information was not material because the warrant would "necessarily, nevertheless, have issued" even if that information had been disclosed to the issuing judge. Id. at 268. The First Circuit affirmed this result. Id. Thus, Cole serves to re-emphasize that the Court of Appeals for the First Circuit believes Franks is applicable when it is alleged that provisions of Title III which reflect constitutional requirements

have been violated in the process of obtaining a warrant.

[*1304] In 1986, Title III was amended in a manner which again recognizes that there is a distinction between violations of constitutional and non-constitutional provisions of that statute, and between the exclusionary rules applicable to each. To respond to the development of new technology, Congress in 1986 amended Title III to cover electronic as well as wire and oral communications. In doing so, § 2518(10)(c) was added to the statute. It provides:

> The remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications. (emphasis added).

The "remedies and sanctions" in Title III include § 10(a), which was not explicitly amended to cover electronic as well as oral and wire communications.

The reference in § 10(c) to "unconstitutional" violations indicates it is the contemporary understanding of Congress and the President that the judicially crafted exclusionary rule governs conduct which violates both the Fourth Amendment and the provisions of Title III which implement its requirements. The legislative history reinforces this view. The House Report states:

> In the event that there is a violation of law of a constitutional magnitude the court involved in a subsequent criminal trial will apply the existing constitutional law with respect to the exclusionary rule. Mapp v. Ohio, 367 U.S. 643, 652, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961); Massachusetts v. Shepperd, 468 U.S. 981, 104 S. Ct. 3424, 82 L.

Ed. 2d 737 (1984); United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

H. R. No. 99-647, 99th Cong., 2d. Sess., 48 (1986); 1986 Leg. Hist. at 3577.

Section 10(c) has been viewed as clarifying that for oral, wire, and electronic communications "Congress has incorporated the good faith exception for violations of a constitutional magnitude." J. Carr, supra, § 6.3A, p. 6-84.2 (1990). To the extent that this observation includes the principles of Franks on which Leon expressly relied, this court concurs.[12]

---

[12]The Court of Appeals for the Second Circuit has also recognized in dicta that Fourth Amendment suppression analysis may be applicable to questions arising under § 2518(10)(a). See United States v. Ojeda Rios, 875 F.2d 17, 23 (2d. Cir. 1989), vacated on other grounds, 495 U.S. 257, 110 S. Ct. 1845, 109 L. Ed. 2d 224 (1990).

As described previously, in 1987, the Supreme Court decided Krull, which reaffirmed and extended to reliance on a statute the good faith exception to the exclusionary rule enunciated in Leon. Krull, 480 U.S. at 341. Since then, the Court of Appeals for the First Circuit has in dicta again indicated that the Franks standard is applicable when a court is faced with allegations of factual inadequacies or misrepresentations in an application for a warrant under Title III. United States v. Ashley, 876 F.2d 1069, 1073 (1st Cir. 1989).

The roving intercept provision of Title III, § 2518(11)(a)(ii) relaxes the statutory requirements of §§ 2518(1)(b)(ii) and (3)(d) concerning the place where interceptions will occur. As

indicated earlier, the modified provisions were intended to address the constitutional commands of particularization as they were stated in Berger and Katz.

Accordingly, defendants' motion to suppress the evidence of the Mafia induction ceremony intercepted at 34 Guild Street relates to provisions of Title III which reflect constitutional requirements and must be analyzed pursuant to the constitutional exclusionary rule -- more specifically, pursuant to Franks. Cole, 801 F.2d 262; Mastroianni, 749 F.2d 900; Southard, 700 F.2d 1.

Franks applies to omissions from an application or affidavit, as well as to affirmative misrepresentations. United States v. Hadfield, 918 F.2d 987, 993

(1st Cir. 1990); Cole, 807 F.2d at 267-68; United States v. Colkley, 899 F.2d 297, 300 (4th Cir. 1990).

The instant case in essence involves omissions, although certain uncorrected representations in Steffens' Affidavit [*1305] constituted misstatements. In order to obtain suppression, defendants must show by a preponderance of the evidence both that: (1) facts were omitted "'with the intent to make, or in reckless disregard of whether they thereby made, the [application and] affidavit misleading,'" Colkley, 899 F.2d at 300 (quoting United States v. Reivich, 793 F.2d 957, 961 (8th Cir. 1986)); and (2) that such omitted facts were material. Franks, 438 U.S. at 156; United States v. Melvin, 596 F.2d 492, 499-500 (1st Cir. 1979), cert. denied, 444 U.S.

837, 62 L. Ed. 2d 48, 100 S. Ct. 73 (1979); Mastroianni, 749 F.2d at 909; Southard, 700 F.2d at 9-10; Cole, 807 F.2d at 268; United States v. Ippolito, 774 F.2d 1482, 1485 (9th Cir. 1985) ("False statements that are material in causing the warrant to issue will invalidate it.").

With regard to the first prong of the Franks test, "Franks protects against omissions that are designed to mislead, or that are made in reckless disregard of whether they would mislead" a judge. Colkely, 899 F.2d at 301 (emphasis in original). Mere negligence is not enough. Id.

With regard to the second prong of the Franks test, the information must be material to the issuance of the warrant. As the parties and the court agree,

materiality should be evaluated by an objective standard and from the perspective of a reasonable judge.

In this context, the Court of Appeals for the First Circuit has indicated that information is not "material" if a warrant would "necessarily, nevertheless, have issued" if the information had been accurately and completely disclosed. Cole, 807 F.2d at 268; see also United States v. LaRouche Campaign, 695 F. Supp. 1290, 1305 (D. Mass. 1988) aff'd, 866 F.2d 512 (1st Cir. 1989); United States v. Ippolito, 774 F.2d 1482, 1486, 1487 (9th cir. 1985) (If a reasonable district judge "could have denied" the application if fully informed, the information is material; but if the omitted information or misstatement "would have no effect" on the issuance of a warrant, it is

immaterial.); United States v. Sobamowo, 892 F.2d 90, 93-94 (D.C. Cir. 1989) (suppression denied because of "no cause to believe" that omitted information "if known to the district judge, would have altered the district court's determination" to issue the warrant) cert. denied, 111 S. Ct. 78 (1990); United States v. Massino, 657 F. Supp. 101, 107 (S.D.N.Y. 1987) ("Suppression is mandated if, with the additional information, the issuing judge would not have found the requisite elements . . .")

.

Thus, this court understands "material information" to be information which reasonably might have prompted a district judge being asked to issue the warrant to have denied the request. If a reasonable judge either might or might not have

authorized the requested electronic surveillance if fully informed, the information at issue is material, and its omission requires suppression. If, however, a reasonable judge would have authorized the electronic surveillance anyway, suppression is not appropriate.

The government contends that this formulation of "materiality" is more favorable to the defendants than the standard established by Franks. See Government's Supplemental Memorandum of Law Concerning Title 18, United States Code, Section 2518(11)(a)(ii) filed March 18, 1991. The government asserts that "the defendant has the burden of showing that if the information at issue had not been omitted from the supporting affidavit, the issuing court's

determination would necessarily have been different." Id. at 7 (emphasis added).

The government's position is based in part on the language in Franks stating that a defendant must prove by a preponderance of the evidence that "with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish" a proper basis for issuing the warrant. 438 U.S. at 156.[13] In Colkley, the Fourth

---

[13]The government also relies in part on the language in Franks concerning presumed validity of an affidavit supporting a request for a search warrant. 438 U.S. at 172. This reliance, however, is misplaced. Franks indicates it is appropriate to presume an affidavit is valid for the purposes of deciding whether a defendant has made a sufficiently specific challenge to its truth to obtain an evidentiary hearing. Where, however, it is shown that there are misstatements or omissions concerning an affidavit, Franks does not suggest these imperfections should be presumed to be immaterial.

Circuit described [*1306] the implications of this element of the Franks test as follows:

> The district court misstated the type of materality that Franks requires. It believed that the affiant's omission was material because it "may have affected the outcome" of the probable cause determination. However, to be material under Franks, an omission must do more than potentially affect the probable cause determination: it must be "necessary to the finding of probable cause." Franks, 438 U.S. at 156, 98 S. Ct. at 2676. For an omission to serve as the basis for a hearing under Franks, it must be such that its inclusion in the affidavit would defeat probable cause for arrest. See Reivich, 793 F.2d at 961. Omitted information that is potentially relevant but not dispositive is not enough to warrant a Franks hearing. Id. at 962.

899 F.2d at 301.

Similarly, in Reivich, the Eighth Circuit reversed an order of suppression based on a finding that the omitted facts concerning probable cause "might have changed the decision of the judicial

officer issuing the warrant." 793 F.2d at 962. Rather, the Eighth Circuit suggested the relevant question is whether the supplemented or corrected affidavit "could not" have supported issuance of the warrant. Id. (emphasis in original). Thus, the Eighth Circuit found suppression to be unjustified because an affidavit including the omitted information "still would have supported a finding of probable cause." Id. See also United States v. Paredes-Moya, 722 F. Supp. 1402, 1414, n. 11 (N.D.Tex. 1989) (questioning whether the Ninth Circuit in Ippolito "meant to establish so lenient a footing for suppression as to be guided by what a reasonable judge could do.") (emphasis in original), aff'd in part and rev'd in part, United States v. Guerra Marez, (5th Cir. 1991).

There is, therefore, some support for the government's claim that Cole imposes a higher standard than Franks in holding that omitted information is not material only if "the warrant, necessarily, [would] have issued" if that information had been disclosed. Cole, 807 F.2d at 268. The formulation of materiality used by this court, however, implements and amplifies the standard Cole indicates is appropriate. The government, however, has not been prejudiced if this standard is higher than contemplated by Franks because, as set forth in the following section, this standard is satisfied in this case.

2. Suppression of a violation of § 2518(ii) is inappropriate because neither

of the Franks requirements has been satisfied.

As indicated earlier, the government erred in not telling Judge Nelson on October 27, 1989, of the information it had recently received regarding 34 Guild Street as the possible site for an imminent Mafia induction ceremony. Thus, the question whether to suppress the conversations intercepted at 34 Guild Street must be analyzed under Franks. This analysis demonstrates that exclusion of the evidence at issue is not justified: (1) because the government's omissions and misstatements were not intended to mislead the court, and were not made with reckless disregard for the truth of the Application [**129] or the Steffens' Affidavit; and (2) because

the omissions and misstatements were not material.

Prior to the time it had information concerning the actual location of the possible Mafia induction ceremony, it was within the government's discretion not to tell the court it hoped to capture such a ceremony if a roving intercept warrant was issued. With regard to establishing that there is probable cause for the issuance of a warrant, the government must make "a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his [or her] belief that an order should be issued." § 2518(1)(b) (emphasis added). Thus, the government has [*1307] some discretion to rely upon and disclose less than all of its evidence tending to establish probable cause, as long as

there is no effort to mislead the court into approving a warrant which might otherwise not have been issued.

In this case, at the FBI's request, neither the Application nor the Steffens' Affidavit were drafted to include any mention of the possible interception of a Mafia induction ceremony because of the government's interest in providing maximum protection for the confidentiality of its informants. The government did not decide to withhold this information because it was concerned that there might be problems with obtaining or executing the warrant if the judge were informed that it might be used to intercept the induction of new members in the Patriarca Family. Initially, it was a legitimate exercise

of the government's discretion not to mention the possible induction ceremony.

By the afternoon of Friday, October 27, 1989, however, the government had probable cause to believe an induction ceremony would occur on October 29, 1989 at 34 Guild Street -- as well as substantial reasons to be skeptical about whether this would occur. The information concerning 34 Guild Street was relevant to whether it was practical to describe in conventional terms a place where communications were to be intercepted, § 2518(1)(b)(ii), and whether there was probable cause to believe that such place was about to be used in connection with an offense for which Title III surveillance could be authorized, § 2518(3)(d).

In contrast to the requirements concerning probable cause, the government's obligation to make a "full and complete statement" concerning the practicality of specifying the place or places to be bugged is unqualified; the government is obligated to inform the court of all of its information relating to this issue. Thus, in this case the government had a duty to revise or supplement the Application and Steffens' Affidavit it had furnished informally to Judge Nelson for his review in order to advise him of the recently obtained information concerning 34 Guild Street. See Mastroianni, 749 F.2d at 910 ("The magistrate should have been informed of the new development in the case."); United States v. Marin-Buitrago, 734 F.2d 889, 894 (2d Cir. 1984).

Even where, as here, the omitted information is not material, it is important that the government satisfy its obligation to make a full and complete statement concerning the practicality of specifying in conventional terms a location to be bugged pursuant to the requested warrant. As described earlier, the roving intercept provisions of Title III -- and their constitutionality -- rely in meaningful measure on an independent judicial officer, rather than a law enforcement officer engaged in the competitive business of combatting crime, deciding that it is reasonable, necessary, and appropriate to relax the usual particularity requirements of the statute. See Marin-Buitrago, 734 F.2d at 894. The court in this case did not have an opportunity to make the fully informed

decision on this issue which § 2518(11)(a) contemplates.

Accordingly, the implications of this imperfection in the government's conduct must be analyzed under Franks. To facilitate this analysis, the court permitted the defendants to examine Kottmyer regarding her reasons for not telling Judge Nelson on October 27, 1989, about 34 Guild Street. The reasons for allowing this examination were stated in the court's Order dated March 22, 1991 and amplified orally at the outset of the proceedings on March 25, 1991.[14]

---

[14]On February 28, 1991, the court ordered the interrogation of Kottmyer on several issues. The government filed a substantial memorandum urging reconsideration on the basis that the Franks standard for obtaining a hearing had not been satisfied and that unwarranted examination of Kottmyer on some issues could jeopardize the confidentiality and safety of informants.
(continued...)

[*1308] At the time the court ordered Kottmyer's testimony, it was not clear to the court that Franks, rather than Giordano or the framework utilized in Chun, see note 10, supra, should govern the disposition of defendants' motion to suppress; the applicability of Franks has since become evident.[15]

---

[14](...continued)
The defendants opposed the motion to reconsider. After several hearings, the court granted the government motion to reconsider on some issues because the standards of Franks to obtain a hearing were, for those issues, not met. The court, however, again decided to allow the examination of Kottmyer on the most critical contested issue -- the question of the failure to inform Judge Nelson concerning 34 Guild Street. See Order dated March 22, 1991.

[15]Ironically, although the government vigorously resisted having Kottmyer testify, it was in the argument following her interrogation that the government most effectively communicated that the First Circuit had regularly employed Franks analysis in its relevant Title III decisions.

More importantly, however, the court had discretion whether to hold the hearing, See United States v. LaRouche Campaign, 682 F. Supp. 610, 621-22 (D.Mass. 1987); Mastroianni, 749 F.2d at 910, (The court did not abuse its discretion in denying defendants a Franks hearing). The court decided it was most appropriate to permit defendants' counsel to cross-examine Kottmyer. The reasons for this included the following.

The government not only failed to inform Judge Nelson of the information it had received regarding 34 Guild Street prior to his issuance of the warrant, it also did not initially inform the defendants or this court that it had such information. The government's initial memorandum opposing the motion to suppress addressed the issue whether the

court should have been furnished with information concerning 34 Guild Street acquired after the warrant issued, but did not disclose all of the relevant facts in this case.[16] Although the

---

[16]The government in its initial memorandum concerning § 2518(11)(a)(ii) addressed the issue concerning constitutionality as it was posed by the defendants, without disclosing to the defendants or the court facts, solely known to the government, that would obviously strengthen defendants' arguments. More specifically, the government's memorandum stated:

"In spite of the demonstrated showing in the Affidavit, the defendant Patriarca argues that because the government installed the bug at 34 Guild Street the night before the interceptions occurred, designation of the location pursuant to § 2518(1)(b)(ii) was not impractical and the government should have applied for a standard Title III order identifying 34 Guild Street as the location to be searched. Without any support in the language of the statute, the defendant argues that the government is required to apply for a standard Title III order if, after the issuance of a roving order but before its implementation, the government learns, less than twenty-four hours in advance of a meeting, the intended

(continued...)

government corrected and completed the record when invited by the court to file affidavits concerning when it first learned of 34 Guild Street as the possible location for the ceremony, the

---

[16](...continued)
probable location. In the first instance, this argument does not negate the probable cause and impracticality information that was presented to the court on October 27. Second, the statute contains no restrictions or limitations of the kind suggested by the defendant. In addition to there being no support in the statute for the defendant's position, it is clear from the language of the statute that Congress recognized that, as a practical matter, prior knowledge of the location must exist in order to effectively utilize the authorization in a roving order; it is self-evident that equipment must be installed before conversations can be intercepted and, ipso facto, in every case involving implementation of a roving order, there must be advance knowledge on the part of investigating agents of the intended location of a meeting." Government's Response to Defendants Patriarca's and Ferrara's Motions to Suppress All Evidence Derived From Oral Intercept Order in MBD 89-1015 and to Dismiss the Indictment, filed January 2, 1991 (Docket #404) at 20-21.

government's initial lack of candor was -- and remains -- disturbing to this court.

State of mind is an essential element of the Franks test, and defendants had no means of challenging or providing evidence concerning Kottmyer's state of mind without examining her. See Franks, 438 U.S. at 165. Thus, the court felt the government's conduct raised a sufficiently substantial question concerning its good faith to afford the court discretion as to whether a Franks hearing on the issue of 34 Guild Street should be granted.

This exercise of the court's discretion was influenced by the potential importance of the court's decision concerning the government's motives and the related desire to make

that decision on a well informed basis. This court also felt that a thorough record would be of assistance to any reviewing court and would likely encourage greater deference to this court's findings of facts. Cole, 807 F.2d at 268 ("In reviewing findings made after a Franks hearing, [the First Circuit] [*1309] applies a clearly erroneous test."). As the parties estimate that a complete trial of this case will take a year or more, it is particularly desirable that important issues be explored thoroughly and decided correctly to minimize the possibility that a retrial will be required.

Finally, the court was encouraged to allow a hearing as a matter of fairness to the defendants. Absent the evidence intercepted at 34 Guild Street there may

not be a prosecutable case against some of the defendants, including Raymond Patriarca, the alleged "Boss" of the Patriarca family. The government contends that some of the other defendants may, under the Sentencing Guidelines, face up to life sentences if convicted in this case. Thus, it appeared appropriate for the court to be liberal in exercising its discretion as to whether defense counsel should be allowed to question Kottmyer.

The examination of Kottmyer, however, served primarily to provide added evidence of her good faith. As described earlier, the court concludes that Kottmyer acted in complete good faith, without any intention to mislead Judge Nelson. Nor did she act with reckless disregard for the truth or for the government's legal obligations.

Contrary to defendants' contentions, Kottmyer did not initially or ultimately fail to inform Judge Nelson of the possible Mafia induction ceremony because of a concern that it would involve associational activity protected by the First Amendment. This claim or consideration simply did not occur to her.

When the Application and Steffens' Affidavit were drafted, Kottmyer interpreted the roving intercept requirement that the government provide a full and complete statement concerning the practicality of specifying a location to be bugged, § 2518 (11)(a)(ii), to be synonymous with the parallel provision pertaining to roving wiretap which requires a showing that the proposed target is intentionally attempting "to

thwart interception by changing facilities," § 2518(11)(b)(ii). As discussed in Section III.3, supra, the legislative history suggests that the requirements of the two provisions are "substantially similar," 1986 Leg. Hist. at 3586, and that a case in which a target is trying to evade surveillance would justify roving electronic surveillance as well as a roving wiretap.

As of October 29, 1989, there were no cases interpreting the roving intercept or wiretap provisions of Title III. It was then reasonable for Kottmyer to believe the requirements to obtain both were the same; indeed, this court initially shared that view.

On intense and prolonged analysis, however, this court concludes that view is wrong. The roving wiretap provision

focuses the court's inquiry on whether a proposed target is trying to thwart surveillance; the roving intercept provision requires consideration of whether, without regard to a target's state of mind or efforts, it is practical to specify in conventional Title III terms a place to be bugged. This statutory distinction may seem illogical. However, "the life of the law has not been logic: it has been experience." O.W. Holmes, Jr., The Common Law at 1 (1881). Nevertheless, although the court now concludes that the government's interpretation of what § 2518(11)(a)(ii) required was incorrect, given the pace at which the issue had to be analyzed and the ambiguity of the law, the government's interpretation of what it

was obliged to tell Judge Nelson was reasonable not reckless.

In any event, Kottmyer did not withhold the information concerning 34 Guild Street to obtain a tactical advantage. Indeed, as Kottmyer later observed, disclosure would have strengthened the government's showing that the targets were trying to frustrate efforts to intercept their communications.

Kottmyer, however, only consciously considered the information concerning 34 Guild Street in the context of the proposed Order's requirement that she inform the court, if possible, prior to any entry to install a listening device. As she was on October 27, 1989 skeptical about whether the government would decide to make an entry at 34 Guild Street, she

did not tell Judge Nelson about that location. However, her notice to him of the possibility of [*1310] an entry that weekend indicates that she was not trying to mislead the judge. See Hadfield, 918 F.2d at 993 ("It would be arrant nonsense to argue that [the affiant], if he were trying to deceive [the judge], would nonetheless have attached the diagram to the affidavit."). Rather, she acted in complete good faith.

In these circumstances, defendants have failed to satisfy the first prong of the Franks test. The motion to suppress must, therefore, be denied.

The defendants, moreover, have also failed to satisfy the second essential element of the Franks test because the misstatements and omissions now at issue were not material. Rather, the court

finds that if the misstatements in the Steffens' Affidavit had been corrected and all of the government's information concerning 34 Guild Street had been shared with Judge Nelson, he, like any reasonable judge, would nevertheless have authorized electronic surveillance of 34 Guild Street, either by signing the proposed Order authorizing the roving interception in its original form or by amending it to add express authorization for 34 Guild Street, as well as other, unspecified locations.

At the hearing on March 14, 1991, the parties agreed that the issue of materiality should be resolved on the written record, without regard to any testimony by Kottmyer. The court agreed.

Based on that record, defendants argue, in essence, that a reasonable

judge presented by the government with a proposed warrant for electronic surveillance will either adapt the Order in the form furnished or reject it in its entirety. See, e.g., Supplemental Memorandum II in Support of Defendant [Patriarca's] Motion to Suppress Oral Intercepts Resulting from M.B.D. No. 89-1015 at 4-8. On this assumption, the defendants argue that a reasonable judge, fully informed about 34 Guild Street, could have rejected the proposed Order. Id. Thus, they assert, the Application was materially false, or materially misleading, and suppression is required.

Defendants' claim concerning materiality, however, mistakes the manner in which reasonable judicial officers discharge their duties when asked to issue warrants. Reasonable judges take

seriously their responsibility to render independent judgments in reconciling privacy interests and the legitimate needs of law enforcement. Title III recognizes this. The statute expressly provides that, "the judge may require the applicant to furnish additional testimony or documentary evidence in support of [an] application." § 2518(2). The statute also clearly contemplates that a judge may decide to issue a warrant, but modify the terms proposed by the government. § 2518(3) ("The judge may enter an ex parte order, as requested or as modified . . .").

In this case, if on October 27, 1989, a reasonable judge had been told that information provided by a cooperating individual, by the Federico furlough application, and by the surveillance at

34 Guild Street suggested that there might soon be a Mafia induction ceremony at that address, but was also informed of the efforts which Russo, Carrozza, and Ferrara had used to evade surveillance and the other substantial reasons for the government's skepticism about whether 34 Guild Street would actually be used for such a ceremony, that judge would not have rejected the government's request for a roving intercept warrant. Rather, a reasonable judge would have viewed the possible use of 34 Guild Street as added evidence of the proposed targets' efforts to thwart interception. Some such judges would have endorsed the roving Order in the form proposed by the government. Others would have amended it to make specific findings and authorize interceptions at 34 Guild Street, along

with other then unknown locations. However, no reasonable judge presented on a Friday evening with an Application providing probable cause to believe that there would be an opportunity to intercept a Mafia induction ceremony that weekend would have rejected the request for a roving warrant and run the risk that chance would be lost while the government attempted to revise its submission.

[*1311] This conclusion is reinforced by Judge Nelson's conduct in this case. The judge was informed that interceptions might occur that weekend and that he would be notified in advance if possible. Although this statement suggested the government had information concerning the possible location of an in imminent meeting which was not included

in its papers, Judge Nelson did not request any elaboration. Evidently, he did not view this information as material.[17]

As this analysis suggests, the court concludes that the Steffens' Affidavit contained ample evidence indicating that Russo, Carrozza, and Ferrara were attempting to thwart surveillance and that it was not practical to specify each of the places they were likely to have incriminating conversations in the next 30 days. In addition, while on the

---

[17] As a practical matter, having presided at the lengthy trial of Gennaro Angiulo, at which the Patriarca Family was proved to be a RICO enterprise, Judge Nelson was familiar with the difficulty of obtaining evidence of organized crime generally and of the prior history of the Patriarca Family. See Angiulo, 897 F.2d at 1178. Thus, Judge Nelson was especially likely to have authorized the possible interception of the induction ceremony if he had been informed of it.

evening of October 27, 1989, there was probable cause to believe conversations would be intercepted at 34 Guild Street, there were also compelling reasons to believe that address would not be used and any LCN induction ceremony would be held elsewhere.

Contrary to defendants' contentions, in these circumstances the court was not legally or practically precluded from revising the government's proposed form of Order to in effect issue a conventional Title III warrant for 34 Guild Street while it was being used by Russo, Carrozza and Ferrara, and also granting roving authority for interceptions at other locations they might employ for incriminating discussions. As described in detail earlier, the Supreme Court has recognized

that flexibility concerning the content of warrants is necessary and appropriate in certain, special circumstances. In this case, a warrant allowing interceptions at 34 Guild Street and other locations used by the Order's targets would have fully served the purposes of the Fourth Amendment. The issuance of the roving intercept Order in the form originally proposed by the government would also have been justified by the compelling reasons to doubt that 34 Guild Street would actually be used for any or all of the communications the government had probable cause to believe would occur and hoped to intercept. Therefore, as the government has not been shown to have intentionally or recklessly mislead the court, and because a roving warrant explicitly or implicitly

authorizing interceptions at 34 Guild Street would have issued even if the judge had been fully informed, defendants' motion to suppress on the basis of a violation of § 2518(11)(a) must be denied.

3. The Government was not required by § 2518(1)(c) to disclose in its application the electronic surveillance matters concerning Bianco and Milano.

As described in the findings of facts, supra, Kottmyer's Application and Steffens' Affidavit did not disclose that essentially the same information they contained had recently been used to obtain a warrant from a district judge in Springfield, Massachusetts for electronic surveillance of the automobile of Gaetano

Milano, another alleged member of the Patriarca Family being investigated in connection with many of the same crimes as Russo, Ferrara, and Carrozza, including the Grasso murder. Nor did the government inform Judge Nelson that an authorization for a roving intercept was being simultaneously sought in Rhode Island to investigate Bianco's involvement concerning the same matters.

The defendants assert that these omissions violated § 2518(1)(c) by failing to include a full and complete statement why the Gaetano Milano electronic intercept order and/or the Nicholas Bianco roving electronic intercept order could not be used to investigate the activities of Russo, Ferrara, and Carrozza, thus making "other investigative procedures" likely to

succeed. This contention, however, is incorrect.

[*1312] As set forth below, § 2518(1)(c) has traditionally been interpreted as requiring only a showing that non-Title III investigative techniques are not likely to succeed. Section § 2518(11)(a) does not manifest any intention to alter this interpretation of § 2518(1)(c). Rather, a judge asked to issue a roving intercept warrant must now address two distinct questions: (1) whether electronic surveillance is necessary because less intrusive investigative techniques are not likely to succeed; and, if so, (2) whether it is impractical to designate the address at which certain conversations may be intercepted.

In addition, even if § 2518(1)(c) had been violated, suppression would be inappropriate because the information concerning the efforts to intercept communications of Milano and Bianco were not omitted in order to mislead Judge Nelson and were not, in any event, material to the issuance of the Order.

The Milano order was authorized in Springfield on October 25, 1989, and the Bianco order was authorized in Rhode Island on OCtober 27, 1989, after the Order in the instant case had been issued. Kottmyer was directly involved in both the Milano and Bianco applications. No interceptions were ever made pursuant to either the Milano or Bianco orders despite efforts on the part of the FBI to execute them. Supplemental Affidavit of

Diane M. Kottmyer Assistant United States Attorney at para. 11.

Section 2518(1)(c) provides as follows:

> Each application shall include the following information: (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. (emphasis added).

Its counterpart, § 2518(3)(c) requires that:

> the judge determine[ ] on the basis of the facts submitted by the applicant that: (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. (emphasis added).

Thus, these provisions use the terms "other investigative procedures" and "normal investigative procedures" interchangeably. As explained previously, these necessity provisions are rooted in

the Fourth Amendment's requirement that searches and seizures be reasonable, and the statements in Berger and Katz that invasions of privacy be no greater than necessary under the circumstances.

The First Circuit has held that under §§ (1)(c) and (3)(c), the government is required to "'make a reasonable, good faith effort to run the gamut of normal investigative procedure before resorting to means so intrusive as electronic interception of telephone calls.'" United States v. Uribe, 890 F.2d 554, 556 (1st Cir. 1989) (quoting United States v. Hoffman, 832 F.2d 1299, 1306-07 (1st Cir. 1987)); see also United States v. Ashley, 876 F.2d 1069, 1072 (1st Cir. 1989). The First Circuit has also held that the purpose of the necessity requirement is "'to assure that wiretapping is not

resorted to in situations where traditional investigative techniques would suffice to expose the crime.'" United States v. Scibelli, 549 F.2d 222, 226 (1st Cir. 1977), (quoting United States v. Kahn, 415 U.S. 143, 153 n. 12, 39 L. Ed. 2d 225, 94 S. Ct. 977 (1974)), cert. denied, 431 U.S. 960 (1977).

Thus, First Circuit precedent indicates that the necessity provisions of Title III require the government to address only the efficacy of non-electronic surveillance procedures. In Hoffman, the court listed the traditional techniques employed by the DEA as including use of confidential informants, visual surveillance, pen registers, and telephone toll records. Hoffman, 832 F.2d at 1307. The court then concluded that it was not error for the district court to

authorize electronic surveillance. Id. In Uribe, the court upheld the wiretap as the defendants failed to "convincingly suggest what else, short of electronic surveillance, the FBI might fruitfully have attempted to further the probe." Uribe, 890 F.2d at 557.

Prior to the enactment of the roving intercept provision in 1986, other Circuits had also indicated that subsections (1)(c) and [*1313] (3)(c) only apply to non-electronic techniques. The Sixth Circuit held that under these provisions "all that is required is that the investigators give serious consideration to the non-wiretap techniques prior to applying for wiretap authority and that the court be informed of the reasons for the investigators' belief that such non-wiretap techniques

have been or will likely be inadequate." United States v. Lambert, 771 F.2d 83, 91 (6th Cir. 1985), cert. denied, 474 U.S. 1034, 88 L. Ed. 2d 577, 106 S. Ct. 598 (1985). Similarly, the Eleventh Circuit had held that these provisions are intended "to inform the issuing judge of the difficulties involved in the use of conventional techniques." United States v. Alonso, 740 F.2d 862, 868 (11th Cir. 1984) (quoting United States v. Hyde, 574 F.2d 856, 867 (5th Cir. 1978)), cert. denied, 469 U.S. 1166, 83 L. Ed. 2d 939, 105 S. Ct. 928 (1985).

The legislative history further supports the conclusion that (1)(c) addresses non-electronic techniques solely. It states:

> Normal investigative procedure would include, for example, standard visual or aural surveillance techniques by law enforcement

> officers, general questioning or interrogation under an immunity grant, use of regular search warrants, and the infiltration of conspiratorial groups by undercover agents or informants.

1968 Leg. Hist. at 2190.

The existence of § 2518(1)(e) in Title III reinforces the view that subsection (1)(c) was not intended to compel disclosure of other authorized Title III surveillance. Subsection (1)(e) reflects the understanding that other efforts to engage in electronic surveillance could properly affect a decision whether to issue a requested Title III warrant. The statute addresses this point by requiring in subsection (1)(e) disclosure of all previous Title III applications concerning persons specified in the pending application. Limiting disclosures concerning other efforts at electronic surveillance to persons specified in the

application is consistent with the principal that "electronic surveillance may be permissibly employed against certain members of a criminal organization even though concrete evidence against other members has already been gathered." Massino, 657 F. Supp. at 108 (quoting Orozco, 630 F. Supp. at 1511, which cites United States v. Bailey, 607 F.2d 237, 242 (9th Cir. 1979) cert. denied, Whitney v. United States, 445 U.S. 934, 63 L. Ed. 2d 769, 100 S. Ct. 1327 (1980); United States v. Newman, 733 F.2d 1395, 1399 (10th Cir. 1984); United States v. Johnson, 645 F.2d 865, 867 (10th Cir.), cert. denied, Abiledinger v. United States, 454 U.S. 866, 70 L. Ed. 2d 168, 102 S. Ct. 329 (1981)).

In any event, defendants do not contend that the Fourth Amendment requires disclosure of other efforts to intercept communications concerning particular crimes. The question presented is one of statutory interpretation. The express language of both subsections 1(c) and 1(e) -- as well as the cases interpreting § 1(c) -- indicate that § (1)(c) requires disclosure only of "normal," non-Title III investigative techniques.

The enactment of the roving intercept provisions of § 2518(11)(a)(ii) did not alter the requirements of § 2518(1)(c). Subsection (11)(a) expressly modifies subsections (1)(b)(ii) and (3)(d). If the 1986 amendments were intended to revise subsection (1)(c) when a roving intercept was involved, that subsection too could

and would have been addressed directly. It was not. Thus, the court concludes that in the instant case subsection 1(c) did not require that the Application disclose the efforts to intercept Bianco or Milano.[18]

In addition, even if the failure to include the Milano and Bianco matters in the Application violated subsection (1)(c), suppression would not be justified under [*1314] Franks. The

---

[18]Kottmyer stated that she did not include the Milano or Bianco matters in her Application because she did not want to risk disclosure of those surveillances before they were complete through the anticipated arrests of Russo, Ferrara, and Carrozza and the subsequent disclosure of the Application and Steffens' Affidavit in this case. Kottmyer Supp. Aff. para. 10. This was a permissible exercise of discretion. It may, however, in other matters be appropriate for the government to disclose other efforts to intercept communications even though this would exceed what § (1)(c) requires.

evidence indicates that these matters were not disclosed because Kottmyer had a good faith belief such disclosure was not legally required and it was in the best interests of the investigation not to divulge them gratuitously. Kottmyer did not deliberately attempt to mislead Judge Nelson on this issue. Nor did she act with reckless disregard for the truth or for the government's obligations.

Moreover, even if the Milano and Bianco matters had been included in the Application, the roving Order would nevertheless have issued anyway. The government had probable cause to believe many people were involved in the crimes under investigation, including the Grasso murder. There was no evidence indicating that Ferrara, Russo, or Carrozza would be intercepted in Milano's automobile. Nor

was the government required to choose between targeting Bianco and the three individuals in Massachusetts; all four could have been named in the same roving warrant if Bianco had operated in Massachusetts rather than Rhode Island.[19] It was permissible for the government to investigate all of the targets simultaneously. Thus, disclosure of the efforts to intercept Milano and Bianco would not have caused a reasonable judge to reject the request for the roving intercept Order at issue in this case.

---

[19]The issuing judge may authorize interceptions "within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction)." § 2518(3).

Accordingly, defendants' claims arising out of the efforts to intercept communications involving Milano and Bianco do not provide a basis for suppressing the evidence obtained from the electronic surveillance of 34 Guild Street.

4. The Application should have disclosed prior requests for electronic surveillance concerning additional individuals, but this error does not justify suppression.

The defendants contend that by failing to provide the prior electronic surveillance applications of those individuals named in the Application other than Russo, Ferrara, and Carrozza, the government violated 18 U.S.C. § 2518(1)(e). This is another question of

first impression. This court concludes that defendants are correct and that the government failed to meet its obligations under subsection (1)(e).

Defendants also assert that this violation of subsection (1)(e) requires suppression of the communications intercepted at 34 Guild Street. This contention, however, is not correct. The disclosure of prior applications required by subsection (1)(e) goes beyond the requirements of the Fourth Amendment. It is, therefore, subject to the statutory exclusionary provisions of §§ 2515 and 2518(10), as interpreted by the Supreme Court in Giordano, Chavez, and Donovan. Subsection (1)(e) constitutes a non-central provision of Title III. As the court finds the government's failure to comply with the requirements of

subsection (1)(e) to have been a good faith, inadvertent error, suppression is not permissible or appropriate.

More specifically, § 2518(1)(b)(iv) requires that an application contain a full and complete statement of "the person, if known, committing the offense [which justifies Title III surveillance] and whose communications are to be intercepted." § 2518(1)(b)(iv). The Supreme Court has interpreted this provision to mean that an application "must name an individual if the government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations." Donovan, 429 U.S. at 428. Thus, for the purposes of subsection (1)(b)(iv), the Court has determined that

it is insufficient to identify only the principal target of a requested warrant if there are other known individuals whose incriminating communications are expected to be intercepted. Id. at 424-25. [**157]

[*1315] Section 2518(1)(e) requires that an application for a Title III warrant include a full and complete statement of facts concerning the prior applications to intercept any person specified in the application.

In this case, the Application sought authorization to conduct roving electronic surveillance of Russo, Ferrara, and Carrozza. These three individuals were defined by the government as the "principals" the roving warrant sought to target. Steffens Aff. para. 2. The Application further stated

and there was probable cause to believe Angelo Mercurio, Frank Imbruglia, Raymond Patriarca, Nicholas Bianco, Matthew Guglielmetti, Jr., Gaetano Milano, Frank Pugliano. Louis FailIa, John Castagna, and John Farrell were also engaged in the enumerated offenses. Application para. 5 (a)-(d). The Application went on to assert, however, only that there was probable cause to believe that Russo, Ferrara, and Carrozza would be intercepted at various and changing locations if the roving Warrant issued. Id. at para. 5(e). The proposed Order drafted by the government and entered by Judge Nelson made the same distinction between the many named individuals there was probable cause to believe were engaged in the enumerated crimes and the three targets there was probable cause to

believe would be intercepted discussing those crimes at various different locations. Compare Order paras. 1 to 4 with para. 5.

The government, in Steffens' Affidavit, disclosed only prior applications to intercept Russo, Ferrara, and Carrozza. This reflected Kottmyer's belief that it was only necessary to provide such information concerning persons named as principals in the Application. Kottmyer Aff. para. 4.

The Application and Steffens' Affidavit did not, however, mask the fact that prior applications for all of the individuals named in the Application were not being disclosed. The Application stated that the Steffens' Affidavit "contains a full and complete statement of the facts concerning all previous

applications . . . [concerning] JOSEPH H. RUSSO, VINCENT M. FERRARA, and ROBERT F. CARROZZA." Application para. 7. Steffens' Affidavit plainly stated that he was providing information concerning prior applications for "the persons named as principals in this affidavit." Steffens Aff. para. 5.

In this case it may be arguable whether any individuals other than Russo, Ferrara, and Carrozza had to be named in the Application pursuant to subsection (1)(b)(iv). The answer to this question depends on whether the government had probable cause to believe a person was engaged in the criminal activity under investigation and was expected to be intercepted. Donovan, 429 U.S. at 428. In view of the fact that at the time the Application was signed by Judge Nelson

the government had probable cause to believe it would soon intercept a Patriarca Family induction ceremony, it may have had probable cause to believe at least some of those named as co-conspirators in the Application in addition to Russo, Ferrara, and Carrozza would be intercepted.

In any event, where, as here, the government has decided to name in its Application individuals believed to be co-conspirators of the proposed principal targets of an interception order, it has an obligation to inform the issuing judge of all prior requests for authority to intercept communications of those individuals. The language of subsection (1)(e) is unqualified; it demands disclosure of all prior applications "involving any of the same persons . . .

specified in the application." § 2518(1)(e). The roving intercept provision, of § 2518(11)(a), does not alter this requirement. Moreover, the Supreme Court in Donovan rejected the government's effort to make a distinction between "principals" and other suspects in the context of the naming requirement of subsection (1)(b)(iv). This conclusion is also appropriate with regard to the prior application disclosure requirement of subsection § (1)(e).

The Supreme Court's analysis in Donovan, however, indicates that the government's failure to disclose prior applications concerning individuals other than Russo, Carrozza, and Ferrara is not a basis for suppression in this case. As explained previously, in Donovan the Court expressly [*1316] found that

"it is not a constitutional requirement that all of those likely to be overheard engaging in incriminating conversations be named." 429 U.S. at 427 n. 15. Thus, the statutory exclusionary provisions of Title III were applied in Donovan. Id. at 432 n. 22. The Court denied the request to suppress in Donovan because the naming requirement of subsection (1)(b)(iv) was deemed not "to play 'a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance,'" id. at 437 (quoting Chavez, 416 U.S. at 578), and the violation of the statute was inadvertent. Id. at 436 n. 23.

Violations of the prior application disclosure requirement of subsection (1)(e) must be analyzed for suppression purposes in the same manner as violations

of the naming requirement of subsection (1)(b)(iv). United States v. Van Horn, 789 F.2d 1492, 1500 n. 6 (11th Cir.), cert. denied, 479 U.S. 854, 93 L. Ed. 2d 123, 107 S. Ct. 190 (1986); United States v. Abramson, 553 F.2d 1164, 1169-70. (8th Cir.), cert. denied 433 U.S. 911, 53 L. Ed. 2d 1095, 97 S. Ct. 2979 (1977); Gambale, 610 F. Supp. at 1536-37; Sullivan, 586 F. Supp. at 1320-23; but see Massino, 657 F. Supp. at 107. This is true because:

> It is difficult to see how suppression could be required for noncompliance with § 2518(1)(e) when it is not required for a violation of § 2518(1)(b)(iv). Disclosure of prior applications naming those individuals who are targets of a new investigation necessarily depends on the naming of the targets in the new application. If failure to name target Smith in a wiretap application would not require suppression, the failure to disclose prior applications which Smith was a named interceptee should not require suppression.

Sullivan, 586 F. Supp. at 1323; Gambale, 610 F. Supp. 1536-37 (quoting Sullivan). Accordingly, at least where, as here, a violation of subsection (1)(e) is inadvertent, suppression is not justified. Van Horn, 789 F.2d at 1500; Abramson, 553 F.2d at 1170; Gambale, 610 F. Supp. at 1537; Sullivan, 586 F. Supp. at 1323; but see Massino, 657 F. Supp. at 107 (holding that a prior application might affect the issuing judge's finding of necessity).

In this case, after initially deciding that a Franks hearing should be held on defendants' claim of a § 2518(11)(a)(ii) violation, the court indicated that defense counsel could also examine Kottmyer on the reasons the government did not disclose to Bianco and Milano

matters or the prior applications concerning all of the individuals named in the Application now at issue. See Order dated February 28, 1991, para. 1. The government, however, urged reconsideration of whether any testimony by Kottmyer should be required and persuaded the court that defendants had not made the showing contemplated by Franks to permit examination concerning the alleged violations of subsections (1)(c) or (e).

The court concludes that the violation of subsection (1)(e) now found was inadvertent, rather than the result of an intentional effort to mislead the court or in reckless disregard of the government's obligations. This conclusion rests on the following facts, among others.

As indicated earlier, Kottmyer asserted in her affidavit that she believed that it was only necessary to disclose prior applications concerning the proposed targets of the roving tap, Russo, Ferrara, and Carrozza. Kottmyer Aff. para. 4. This belief, although erroneous, was objectively reasonable. At the time she made her judgment, the requirements of subsection (1)(e) as applied to a roving intercept application had not been addressed in any reported decision. In addition, Kottmyer's interpretation seems supported by the language in Gambale that:

> The statute "requires disclosure of only those previous applications directed at persons for whom [**164] the subsequent application is made." United States v. Sklarof, 552 F.2d 1156, 1160 (5th Cir. 1977) (emphasis in original) . . . There is no requirement that the government disclose previous applications directed at individuals

> who . . . are not named as targets [*1317] in the applications for and the orders authorizing surveillance.

610 F. Supp. at 1536. Gambale is distinguishable from the present case because prior applications were disclosed for everyone named in the application at issue; the key question in Gambale was whether the naming requirement was met. Id. Nevertheless, the novelty of the issue and the foregoing language in Gambale, among other things, made it reasonable rather than reckless for the government to mistake what was required by subsection (1)(e) in this case.

In addition, it was evident from the Application and Steffens' Affidavit that the government was disclosing prior applications only for those it defined as "principals" and not the others named in its submission. This disclosure is

inconsistent with a purported intent to deceive or mislead Judge Nelson. See Hadfield, 918 F.2d at 993.

Accordingly, the court finds the failure to disclose all of the necessary prior applications to have been an understandable, innocent error. Thus, suppression for the government's violation of subsection (1)(e) is not justified.

5. Defendants' remaining claims are without merit or are not ripe for resolution.

Defendant Patriarca makes an additional claim which is not available to the named targets of the roving intercept warrant, Russo, Carrozza, and Ferrara; Barone and Tortora join in this claim. Patriarca asserts that the

government had probable cause to believe that he was implicated in the crimes under investigation, but failed to name him as a target of the roving surveillance or as someone expected to be intercepted. See Memorandum in Support of Motion to Suppress All Evidence Derived from Oral Intercept Orders Issued in Case No. M.B.D. 89-1015 dated November 30, 1990 (Docket #332) at 39. Patriarca argues that the failure to name him, followed by the interception of his conversation pursuant to the roving intercept Order, requires that as to him, and those defendants similarly situated, the intercepted communications be suppressed. Id.

This claim is without merit. As explained earlier, subsection (11)(a)(ii) relaxes the requirement that the place to

be searched be described in conventional Title III terms by modifying subsections (1)(b)(ii) and (3)(d) when the government shows "such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted." Subsection (11)(a)(ii) does not address or alter the general naming requirement of subsection (1)(b)(iv). Rather, it requires identification of the person to be intercepted as the means of describing the place to be searched. The place to be searched is identified as the location at which a certain person is discussing specified crimes because it has been shown to be impractical to identify that place more specifically. This requirement does not, however, mean that it was improper to intercept Patriarca's

communications with Russo, Ferrara, or Carrozza pursuant to the Order in this case.

As one commentator has correctly explained, the subsection (11)(a)(ii) requirement that a roving intercept application identify "the person committing the offense and whose communications are to be intercepted:" Is a more demanding provision than that which governs standard Title III applications and orders: 18 USCS § 2518(1)(b)(iv) requires a standard Title III application, and § 2518(4)(a) requires a standard Title III order, to include "the identity of the person, if known, committing the offense and whose communications are to be intercepted." As this phrase has been interpreted by the Supreme Court, once investigators obtain

a wiretap or oral intercept order, they may listen to any conversation that occurs on the targeted phone or location, even if none of the participants in the conversation has been previously identified as a suspect in criminal conduct, even, that is, if all the conversants are "unknowns," so long as they comply with the mandate to minimize the interception of communications [*1318] that are not pertinent to the investigation.

> The omission of the phrase "if known" from §§ 2518(11)(a)(ii) and 2518(11)(b)(ii), although not explicitly discussed in the Senate Judiciary Committee Report, is obviously intended to limit the availability and use of roving intercepts. . . . § 2518(11) roving interception orders are permissible only when the application demonstrates that a particular identified individual or individuals can be expected to use numerous telephones or locations to discuss their crimes as a means of evading surveillance. This more demanding

> identification requirement precludes investigators from using a roving intercept order as authority to intercept communications between two "unknowns."

C. Fishman, Wiretapping and Eavesdropping § 127.3 (Supp. 1990) (emphasis added) (footnotes omitted).

It is, however, permissible for the government to use a roving intercept order to capture criminal conversation between an anticipated participant who has been targeted by name in a roving order and another individual, whether or not the other person was previously known to the government. Thus, the interception of communications at 34 Guild Street involving Patriarca and Russo, Ferrara or Carrozza was permissible.

As indicated in Section IV.4, supra, Patriarca may be correct in his claim

that he should have been named in the Application and roving Order pursuant to subsections (1)(b)(iv) and (4)(a) as a person "known [to be] committing the offense . . . whose communications [were] to be intercepted." § 2518(1)(b)(iv). Once again, this would depend on whether the government had "probable cause to believe that [he] was engaged in the criminal activity under investigation and expected to intercept [his] conversations." Donovan, 429 U.S. at 428. However, as also indicated previously, a violation of the subsection (1)(b)(iv) naming requirement does not in this case justify suppression. Id. at 436-37.

The government was not, however, required to make Patriarca a principal in its roving intercept Application and proposed Order, even if it had a proper

basis to do so. Generally, law enforcement officers "are not required to use a particular investigative procedure simply because it is allowed under the law." 1 W. LaFave & J. Israel, Criminal Procedure, § 1.2(b) (1984). This principle is especially compelling with regard to electronic surveillance generally and to roving intercept orders particularly. These sensitive investigative techniques should be employed by the government cautiously. As the Supreme Court stated in Giordano, "Congress . . . [in Title III] evinced the clear intent to make doubly sure that the statutory authority [to intercept communications] be used with restraint." 416 U.S. at 515. A finding that suppression is required when someone who could have been targeted in a roving

order is overheard, however, would unneccesarily and improperly abet expansive efforts to obtain roving authorizations.

This conclusion is supported by the Supreme Court's recent decision in Horton v. California, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). In Horton, the Supreme Court qualified the inadvertent discovery rule as it had been stated in the plurality opinion in Coolidge v. New Hampshire, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971). More specifically, in Horton the Court stated that if a law enforcement officer:

> has a valid warrant to search for one item and merely a suspicion concerning the second, whether or not it amounts to probable cause, we fail to see why that suspicion should immunize the second item from seizure if it is found during a lawful search for the first.

Horton, 110 S. Ct. at 2309. This principle is also applicable when the search and seizure at issue involves a criminal conversation between a named target of a roving intercept Order and another individual.

The standards suggested by Horton are fully satisfied in this case. The Order issued by Judge Nelson was valid. As explained [*1319] earlier, it satisfied each of the elements of the warrant clause of the Fourth Amendment, including the requirement of particularity. The Order was also properly issued under the statute. The Application and Steffens' Affidavit were on their face sufficient to establish that it was impractical to specify the place to be searched in the manner usually required by subsections

(1)(b)(ii) and 3(d). See United States v. Ashley, 876 F.2d 1069, 1073-74 (1st Cir. 1989). The misstatements and omitted information concerning practicality were not material.

To the extent the FBI properly executed the Order, the interception of Patriarca and others at 34 Guild Street was permissible. Subsection (11)(a)(ii), by its express terms, indicates that a roving order identifying only one target is authorized. It provides that "the person committing the offense and whose communications are to be intercepted" must be identified. § 2518(11) (emphasis added). This obviously contemplates the interception of criminal communications between a single individual named in a Warrant and others.

To the extent that Patriarca claims that the government did not properly execute the Order, either by failing to minimize the conversations intercepted or by overhearing conversations which did not involve Russo, Ferrara, and Carrozza, his claims are not ripe for resolution. No specific purported imperfections have been identified. If the defendants promptly and precisely identify captured conversations they feel were improperly intercepted under the Order, and if the government then expresses an intention to use that evidence, the court will resolve that more focused dispute.

Patriarca and those defendants similarly situated are not, however, entitled to suppression because they were not made targets of the roving Order in this case.

V. Conclusion and Order

For the reasons stated in this Memorandum, the court concludes:

1. 18 U.S.C. § 2518(11)(a) is constitutional as applied in this case.

2. If the manner in which the Warrant was obtained does not require suppression, the good faith exception to the judicially crafted exclusionary rule which applies to Fourth Amendment violations would operate to defeat defendants' motion to suppress even if the roving intercept provision were deemed unconstitutional.

3. The government's failure to inform the issuing judge of the information it developed on October 27, 1989 concerning the possible use of 34 Guild Street for an imminent Mafia induction ceremony was

a violation of § 2518(11)(a) (ii), but suppression is not a proper remedy for this violation because: (1) the government did not intend to mislead the judge and did not act with reckless disregard for its obligations; and (2) if the omitted information had been disclosed, a reasonable judge would nevertheless have issued a roving warrant explicitly or implicitly authorizing electronic surveillance at 34 Guild Street.

4. The government was not, pursuant to § 2518(1)(c), required to include in its Application information concerning its efforts to intercept communications of Nicholas Bianco and Gaetano Milano, and, in any event, suppression would not be justified if a violation of § 2518(1)(c) were found in this case.

5. The government's failure to disclose the prior applications for electronic surveillance for individuals named in the Application in addition to Russo, Ferrara, and Carrozza constituted a violation of § 2518(1)(e), but suppression is not a proper remedy for this violation.

6. The government was not required to name Patriarca, or any defendant similarly situated, as a target or principal in its Application for a roving intercept warrant, and its decision not to do so does not justify suppression.

7. The imperfections in the government's conduct in this case do not individually or cumulatively justify suppression.

Accordingly, defendants' motion to suppress the communications intercepted

at 34 Guild Street on October 29, 1989,

is hereby DENIED.

Supreme Court, U.S.
FILED
APR 11 1994
OFFICE OF THE CLERK

No. 93-1280

In the Supreme Court of the United States

OCTOBER TERM, 1993

NICHOLAS L. BIANCO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court properly admitted evidence obtained pursuant to the "roving bug" provision of the federal wiretap statute, 18 U.S.C. 2518(11)(a).

2. Whether the warrant-authorized search of petitioner Failla's home satisfied the particularity requirements of the Fourth Amendment.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	22

TABLE OF AUTHORITIES

Cases:

Alderman v. *United States*, 394 U.S. 165 (1969)	16, 17
Application of LaFayette Academy, Inc., In re, 610 F.2d 1 (1st Cir. 1979)	20, 21
Coolidge v. *New Hampshire*, 403 U.S. 443 (1971)	18
Franks v. *Delaware*, 438 U.S. 154 (1978)	8, 12
Illinois v. *Krull*, 480 U.S. 340 (1987)	11
Massachusetts v. *Sheppard*, 468 U.S. 981 (1984)	21, 22
Rakas v. *Illinois*, 439 U.S. 128 (1978)	17
Scott v. *United States*, 436 U.S. 128 (1970)	15
Stanford v. *Texas*, 379 U.S. 476 (1965)	18
United States v. *Baranek*, 903 F.2d 1068 (6th Cir. 1990)	15
United States v. *Beaumont*, 972 F.2d 553 (5th Cir. 1992), cert. denied, 113 S. Ct. 1821 (1993)	19, 20
United States v. *Chavez*, 416 U.S. 562 (1974)	14
United States v. *Cole*, 807 F.2d 262 (1st Cir. 1986), cert. denied, 481 U.S. 1069 (1987)	15
United States v. *Cook*, 657 F.2d 730 (5th Cir. 1981)	20
United States v. *Crozier*, 777 F.2d 1376 (9th Cir. 1985)	19, 21
United States v. *Curry*, 911 F.2d 72 (8th Cir. 1990), cert. denied, 498 U.S. 1094 (1991)	20
United States v. *Donovan*, 429 U.S. 413 (1977)	12, 14
United States v. *Ferrara*, 971 F. Supp. 1266 (D. Mass. 1991)	9

Cases—Continued: Page

United States v. *Gahagan*, 865 F.2d 1490 (6th Cir.), cert. denied, 492 U.S. 918 (1989) 19
United States v. *Garcia*, 785 F.2d 214 (8th Cir.), cert. denied, 475 U.S. 1143 (1986) 15
United States v. *Giordano*, 416 U.S. 505 (1974) 14
United States v. *Guerra-Marez*, 928 F.2d 665 (5th Cir.), cert. denied, 112 S. Ct. 322 (1991) 15
United States v. *Harris*, 903 F.2d 770 (10th Cir. 1990) . 19
United States v. *Haydel*, 649 F.2d 1152 (5th Cir. 1981), cert. denied, 455 U.S. 1022 (1982) 19
United States v. *Ippolito*, 774 F.2d 1482 (9th Cir. 1985). 15
United States v. *Jacobsen*, 466 U.S. 109 (1984) 16
United States v. *Johnson*, 541 F.2d 1311 (8th Cir. 1976)..... 19
United States v. *Karo*, 468 U.S. 705 (1984) 11
United States v. *Leon*, 468 U.S. 897 (1984) 21
United States v. *Luk*, 859 F.2d 667 (9th Cir. 1988) 21
United States v. *Page*, 808 F.2d 723 (10th Cir.), cert. denied, 482 U.S. 918 (1987) 15
United States v. *Spadaccino*, 800 F.2d 292 (2d Cir. 1986) 15
United States v. *Strand*, 761 F.2d 449 (8th Cir. 1985) ... 20
United States v. *Towne*, 997 F.2d 537 (9th Cir. 1993) ... 21
United States v. *Vaughn*, 830 F.2d 1185 (D.C. Cir. 1987) 19
United States v. *Vest*, 813 F.2d 477 (1st Cir. 1987) 15
United States v. *Wuagneux*, 683 F.2d 1343 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983) 19, 21

Constitution and statutes:

U.S. Const. Amend. IV 6, 7, 9, 11, 15, 17, 18, 21
18 U.S.C. 894 3
18 U.S.C. 1343 2
18 U.S.C. 1959(a)(5) 2
18 U.S.C. 1962 3

Statutes—Continued: Page

18 U.S.C. 1962(c) 2
18 U.S.C. 1962(d) 2
18 U.S.C. 2510(11) 16
18 U.S.C. 2516 10
18 U.S.C. 2518 ..... 10, 12
18 U.S.C. 2518(1)(b)(ii) 10
18 U.S.C. 2518(1)(b)(iv) 12
18 U.S.C. 2518(1)(e) 8, 9, 12
18 U.S.C. 2518(3) 10
18 U.S.C. 2518(3)(d) 10
18 U.S.C. 2518(4) 10
18 U.S.C. 2518(10)(a) 13, 14
18 U.S.C. 2518(10)(a)(i) 16
18 U.S.C. 2518(11) 10, 16
18 U.S.C. 2518(11)(a) 3, 7, 9, 10, 11
18 U.S.C. 2518(11)(a)(i) 3
18 U.S.C. 2518(11)(a)(ii) 7, 9, 12, 13
18 U.S.C. 2518(11)(b) 9
18 U.S.C. 2518(12) 10

Miscellaneous:

James G. Carr, *The Law of Electronic Surveillance* (2d ed. Supp. 1994) 15
2 Wayne R. LaFave, *Search and Seizure* (2d ed. 1987) ... 19

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1280

NICHOLAS L. BIANCO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A88) is reported at 998 F.2d 1112. The opinions of the district court (Pet. App. A93-A101, A115-A129) are unreported. A related opinion of the United States District Court for the District of Massachusetts (Pet. App. A130-A399) is reported at 771 F. Supp. 1266.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1993. Petitions for rehearing were denied on September 20, 1993 and on October 7, 1993. Pet. App. A88-A93. On December 8, 1993, Justice Thomas extended the time for filing a petition for a writ of

certiorari to and including February 4, 1994, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioners were convicted of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); and conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d). Petitioners Milano, Pugliano, and Failla were also convicted of committing violent crimes in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5). Petitioners Pugliano and Failla were also convicted of wire fraud, in violation of 18 U.S.C. 1343. Bianco was sentenced to 137 months' imprisonment, Failla to 120 months' imprisonment, Milano to 396 months' imprisonment, and Pugliano to 151 months' imprisonment, with each sentence of imprisonment to be followed by a three-year term of supervised release. The court of appeals affirmed. Pet. App. A1-A88.

1. This case involves petitioners' participation in the affairs of the Patriarca family of La Cosa Nostra. The facts relevant to the petition involve the circumstances surrounding two aspects of the government's investigation of petitioners' activities.

a. On January 9, 1990, FBI agents executed a search warrant at petitioner Failla's home in East Hartford, Connecticut. The warrant authorized the seizure of the following items: "Notes, Ledgers, Envelopes, Papers, and Records Containing Initials, Names, Addresses, Dollar Amounts, Codes, Figures,

and the Like: United States Currency." The application stated that the items sought to be discovered were evidence of violations of 18 U.S.C. 894 and 1962. The supporting affidavit (to which the warrant explicitly referred) detailed Failla's loansharking business and stated that the agents were looking for evidence of Failla's loansharking. While the agents were executing the warrant, they brought items to the attention of Agent William Hutton, who headed the search team and had responsibility to determine whether items should be seized. Hutton had familiarized himself with the warrant and its supporting affidavit, and he understood that the purpose of the search was to discover evidence of loansharking. See Pet. App. A10-A11, A19-A21, A124-A126.

b. During 1989, the government decided that because some members of the Patriarca family suspected that the government was attempting to monitor their activities, the family had begun to structure its communications to avoid electronic surveillance. After learning in October of 1989 that the Patriarca family intended to induct several new members into La Cosa Nostra, the government decided to seek a warrant under 18 U.S.C. 2518(11)(a), which would authorize a "roving bug," that is, an advance judicial authorization of electronic interception without advance specification of the location of the interception. Pursuant to Section 2518(11)(a)(i) (which requires approval of a roving bug by a listed officer of the Department of Justice), on October 24, 1989, the United States Attorney's Office submitted to the Department of Justice a proposed application, an affidavit from an FBI agent, and a proposed order. Those materials described the efforts by the targeted individuals to thwart surveillance, as well as informa-

tion regarding crimes committed by those individuals. The materials did not, however, mention the induction ceremony. See Pet. App. A24-A27.

On October 26, 1989, the FBI learned that the induction ceremony was scheduled for Sunday, October 29, 1989, at or near Wellington Circle in Medford, Massachusetts. Suspecting that one of the inductees might be a Massachusetts prisoner named Vincent Federico, the FBI contacted the Massachusetts Department of Correction and learned that Federico had requested a 28-hour furlough, beginning on the morning of October 29, 1989. Federico's furlough application reported that he intended to stay at the house of his brother-in-law, Stephan DiStefano, at 34 Guild Street, in Medford, near Wellington Circle. See Pet. App. A27-A28.

On October 27, 1989, the prosecutor handling the case delivered the interception application to Judge David Nelson of the United States District Court for the District of Massachusetts. Shortly after the Justice Department approved the application, Judge Nelson signed the order, including a requirement that the government notify the court of all surreptitious entries to install listening devices in advance if possible, and as soon as possible after the entry if advance notice was not possible. See Pet. App. A29-A31.

On October 28, 1989, after observing the DiStefano family leave their home at 34 Guild Street, the FBI entered the home to install listening devices. The prosecutor unsuccessfully attempted to notify Judge Nelson by telephone before the entry, but succeeded in advising the judge of the entry the next morning. Later that day, the agents observed two of the targeted individuals enter 34 Guild Street, and the

interceptions began. During the interceptions, the government overheard and recorded a ceremony that inducted four members of the Patriarca family, including Federico, into La Cosa Nostra. During the ceremony each inductee took an oath of allegiance, submitted to a ritualistic pricking of his finger, and was assigned a "capo" or boss who was to supervise his criminal activity. Old members explained the origins of La Cosa Nostra, instructed the inductees to bring "to the table" all legal and illegal business deals with nonmembers, and extracted promises from the inductees that on orders they would kill their brother or son "without hesitation." See Pet. App. A32-A34.

2. Based in part upon the evidence obtained through the Failla search and the "roving bug," separate indictments were returned in the United States District Court for the District of Connecticut (this case) and in the United States District Court for the District of Massachusetts (*United States* v. *Ferrara*). Motions to suppress the recordings of the induction ceremony were filed in both cases. On April 15, 1991, Judge Wolf issued a lengthy opinion denying the motions filed by the defendants in the Massachusetts case. Pet. App. A130-A399.

On April 19, 1991, the district court in this case denied the motions filed by petitioners, adopting "in its entirety" (Pet. App. A100) Judge Wolf's findings of fact and conclusions of law. *Id.* at A93-A101. The district court also denied a motion filed by Failla to suppress the evidence seized during the January 9, 1990, search of his Connecticut residence. Pet. App. A115-A129. The court rejected Failla's contention that the warrant was overly broad, finding that the warrant, when examined together with the appli-

cation and the affidavit, satisfied the Fourth Amendment's particularity requirement. *Id.* at A122-A129.

3. The court of appeals affirmed. Pet. App. A1-A88.

a. The court of appeals rejected the argument that the warrant authorizing the search of Failla's home was not sufficiently particular to satisfy the Fourth Amendment. Pet. App. A8-A23. The court agreed with Failla's contention that the warrant itself was overly broad because it did not describe in sufficient particularity the items to be seized and made no mention of any criminal statute or criminal conduct. *Id.* at A11-A18. The court nonetheless held that the warrant was rendered sufficient by its reference to the supporting affidavit. *Id.* at A18-A21. Although the warrant did not expressly incorporate the affidavit and the affidavit was not physically attached to the warrant, the court declined to "adhere to formal requirements of incorporation and attachment where as here, it is clear that the involved parties [the federal agents and Failla] were aware of the scope of and limitations on the search." *Id.* at A20. The court explained that the affidavit spelled out the nature and purpose of the proposed search, by detailing its motivation and by specifying the nature of the documents sought. *Id.* at A21. The court also noted that Agent Hutton actively supervised the search after having read the affidavit. Because the agents remained within the scope of the warrant and affidavit when read together, the court concluded that the search was reasonable. *Id.* at A22.

b. The court of appeals also rejected petitioners' challenges to the introduction of the recording of the induction ceremony obtained from the "roving bug." Pet. App. A23-A87. First, the court held that only petitioners Milano and Failla had standing to chal-

lenge the electronic interception of the induction ceremony because they were the only defendants who were present when the recording was made, and because none of the other petitioners claimed any proprietary or possessory interest in the building where the intercepted conversations occurred. *Id.* at A49-A52.

The court next rejected petitioners' constitutional challenge to 18 U.S.C. 2518(11)(a). Pet. App. A52-A65. The court found that the substantial conditions imposed by Congress on the issuance of a "roving bug," in addition to the substantial conditions already imposed on the issuance of any order for electronic surveillance, satisfied the particularity requirement of the Fourth Amendment. Pet. App. A62-A63.

The court then considered petitioners' contentions that the recording should be suppressed because of violations of the statute in this case. The court first addressed petitioners' argument that the absence from the application of the information in the government's possession indicating that 34 Guild Street might be the site of the induction ceremony violated Section 2518(11)(a)(ii)'s requirement that the government provide the court a "full and complete statement as to why specification [of the place where the communication is to be intercepted] is not practical." Pet. App. A68-A76. The court did not directly address the question whether the application violated the statute,[1] but concluded in any event that petitioners' argument on that point did not justify suppression. *Id.* at A72-A76. The court stated that

[1] The court stated only that "the government should have disclosed to the court the information relating to 34 Guild Street." Pet. App. A75.

violations of that disclosure requirement should result in suppression only if the violations satisfied the standard articulated by this Court in *Franks* v. *Delaware*, 438 U.S. 154 (1978). The court then accepted the district court's findings that the government did not engage in "deliberate falsehood or reckless disregard for the truth," and that "the nondisclosure * * * was immaterial." Pet. App. A72.[2] Accordingly, the court upheld the district court's conclusion that the nondisclosure of the 34 Guild Street information did not justify suppression of the recording. *Id.* at A76.

The court also rejected petitioner Milano's argument that the recording should have been suppressed because of the government's failure to disclose in the application prior applications for interceptions of communications involving persons mentioned in the application. Pet. App. A83-A87. The court agreed that the government violated Section 2518(1)(e) when it failed to disclose prior applications not only for the principal "targets" of the surveillance, but also for all other persons mentioned in the application. Pet. App. A83. The court nevertheless concluded that suppres-

---

[2] On the latter point, the court of appeals explained that it agreed with the district court's conclusion that

> there was enough independent information of the nature of the suspects' crimes and their evasive methods to justify issuing the roving order, even without the information about 34 Guild Street. Moreover, even if the judge had been advised of the anticipated induction ceremony at 34 Guild Street, the information would not have eliminated the need for a roving order, because the members of the enterprise were trying to avoid detection, and could easily have changed the location at the last minute.

Pet. App. A75-A76.

sion was not an appropriate remedy because the failure to disclose prior applications was inadvertent; the court noted that there were no judicial decisions interpreting Section 2518(1)(e) at the time the application was filed. Pet. App. A85-A87.

ARGUMENT

1. Petitioners raise several challenges to the introduction at their trial of the recording obtained pursuant to the "roving bug" warrant authorized under Section 2518(11)(a). Because the warrant in this case appears to be the first to result in published judicial opinions regarding that provision,[3] review by this Court of those questions would be premature. In any event, petitioners fail to offer any strong reason for doubting the correctness of the court of appeals' rejection of petitioners' claims.

a. Petitioners contend (Pet. 32-42) that Section 2518(11)(a) is unconstitutional because it does not conform with the particularity requirement of the Fourth Amendment. In light of the detailed provisions that Congress fashioned to circumscribe the use of the provision and the important law-enforcement purposes that justify it, that claim lacks merit.

First, Section 2518(11)(a)(ii) itself requires that the "roving-bug" application include "a full and complete statement as to why * * * specification [of the place where the communication is to be intercepted] is not practical and identif[y] the person[s] committing the offense and whose communications are to be inter-

---

[3] The first two decisions cited at Pet. App. A48-A49 involved the wiretap provisions in 18 U.S.C. 2518(11)(b). The third decision (*United States* v. *Ferrara*, 771 F. Supp. 1266 (D. Mass. 1991)) considered the warrant at issue here.

cepted." That requirement limits the use of the statute to cases where conventional surveillance is impractical. Furthermore, the underlying provisions of Section 2518, which generally apply in full to cases under Section 2518(11)(a),[4] substantially vitiate petitioners' concerns (Pet. 38) about "[t]he general warrant, the unrestricted search, the roving commission." Section 2518(4) requires that the application include a list of the persons whose communications are to be intercepted, a particular description of the types of communications to be intercepted, and a description of the offense to which the communications relate. Also, a court can issue a warrant only if it determines that the application establishes probable cause to believe that a person is committing one of the serious offenses listed in 18 U.S.C. 2516, that the requested surveillance will discover communications concerning that offense, and that normal investigative procedures are inadequate or unduly dangerous. 18 U.S.C. 2518(3). Finally, interceptions under Section 2518(11) cannot occur "until the facilities from which, or the place where, the communication is to be intercepted is ascertained by the person implementing the interception order." 18 U.S.C. 2518(12).

The distinctive feature of Section 2518(11)(a) is its authorization of a warrant that does not specify the particular "place" to be searched. But the analysis

---

[4] The provisions of Section 2518(11) are not a separate authorization for interceptions, but rather as a description of circumstances in which a warrant may be secured without compliance with the requirements of Section 2518(1)(b)(ii) and (3)(d) "relating to the specification of the facilities from which, or the place where, the communication is to be intercepted."

employed by this Court in *United States* v. *Karo*, 468 U.S. 705 (1984), indicates that the Fourth Amendment does not impose a blanket requirement of advance identification of the place to be searched. In response to the government's concern that it might be difficult to secure a warrant authorizing monitoring of a beeper because of the difficulty of predicting the location of the beeper, the Court explained:

> The Government contends that it would be impossible to describe the "place" to be searched, because the location of the place is precisely what is sought to be discovered through the search. However true that may be, it will still be possible to describe the object into which the beeper is to be placed, the circumstances that led agents to wish to install the beeper, and the length of time for which beeper surveillance is requested. In our view, this information will suffice to permit issuance of a warrant authorizing beeper installation and surveillance.

Id. at 718. That analysis suggests that the detailed specification requirements of Section 2518(11)(a) satisfy the demands of the Fourth Amendment. The statute requires specification of the information known to the officers, coupled with an explanation of why further specificity is impractical. The Constitution does not bar that form of warrant.[5]

---

[5] In any event, because no court has ever ruled that Section 2518(11)(a) is unconstitutional, the agents were entitled to rely on those provisions at the time they intercepted the communications at issue here. Accordingly, suppression of that evidence would not be appropriate. *Illinois* v. *Krull*, 480 U.S. 340, 349-355 (1987).

b. Petitioners also contend (Pet. 20-31) that the court of appeals erred in relying on *Franks* v. *Delaware*, *supra*, in declining to suppress the recording here notwithstanding the court's conclusion that the government violated the provisions of Section 2518 in the course of obtaining the warrant.[6]

i. Petitioners' presentation rests on the proposition—which they neither discuss nor defend—that the government's failure to include the information about 34 Guild Street violated the "full and complete statement" requirement of Section 2518(11)(a)(ii). As discussed above, however, the court of appeals did not explicitly conclude that the government had violated that provision. Nor would it have been correct to have

---

[6] The petition refers in passing (Pet. 29) to the court of appeals' conclusion (Pet. App. A83) that the government violated 18 U.S.C. 2518(1)(e) by failing to disclose prior interception applications with respect to persons who were named in the present application, but who were not targets. Because the petition does not address or question, however, the reasons articulated by the court of appeals for not requiring suppression because of that violation (Pet. App. A85-A87), the discussion in the text is limited to petitioners' objections to the nondisclosure of one possible location of the interception.

In any event, this Court's decision in *United States* v. *Donovan*, 429 U.S. 413 (1977), strongly supports the court of appeals' conclusion that the failure to disclose the prior applications did not justify suppression. In *Donovan*, the Court held that a violation of the provision in 18 U.S.C. 2518(1)(b)(iv) requiring the government to identify the individuals whose conversations would be intercepted did not justify suppression because that provision is not one of "those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." 429 U.S. at 433-434. That analysis applies in this case as well.

found a violation. The purpose of the "full and complete statement" requirement is to explain why it "is not practical" to specify the place where the communication is to be intercepted. The information about 34 Guild Street, although it made it likely that some communications would be intercepted at that location, was not material to the question whether the government needed permission to conduct surveillance at unspecified places. The court of appeals recognized that the material in the application included "enough independent information of the nature of the suspects' crimes and their evasive methods to justify issuing the roving order." Pet. App. A75. The court of appeals also recognized that inclusion of the 34 Guild Street information would not have affected the merits of the application, explaining that "the information would not have eliminated the need for a roving order, because the members of the enterprise were trying to avoid detection, and could easily have changed the location at the last minute." *Id.* at A76. Accordingly, the government's failure to include the information—which identified only one possible location of the requested surveillance, and in no way undermined the need for authority to intercept conversations at other places—did not violate the statute.

ii. Even if the failure to include the information is treated as a violation of Section 2518(11)(a)(ii), petitioner's argument that the statute requires suppression would be incorrect. As this Court repeatedly has recognized, the statutory suppression remedy set forth in Section 2518(10)(a) is limited to cases where the communication was "unlawfully intercepted," a term which does not include "every failure to comply fully with any requirement provided [in the statute],"

but is instead limited to "a 'failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.'" *United States* v. *Donovan*, 429 U.S. 413, 432-434 (1977) (quoting *United States* v. *Chavez*, 416 U.S. 562, 574-575 (1974); and *United States* v. *Giordano*, 416 U.S. 505, 527 (1974)).

As the Court explained in *Donovan*, even where a statutory requirement plays a central role in the statutory framework, a violation of the requirement does not justify suppression if the purpose that the particular procedure was designed to accomplish has been satisfied in spite of the error. Hence, in *Donovan* the Court concluded that it was not appropriate to suppress evidence based on the absence from the application of a complete list of the individuals whose conversations would be intercepted. The Court explained that "[i]n no meaningful sense can it be said that the presence of that information as to additional targets would have precluded judicial authorization of the intercept." 429 U.S. at 436. In this case as well, the judgment of the court of appeals rests on its view that inclusion in the application of the information about 34 Guild Street would not have eliminated the need for a warrant or affected the district court's decision to issue one. Accordingly, the statute did not require suppression.

iii. Finally, even if petitioners were correct in their view that the statute was violated, and that the transgression infringed a provision for which suppression is a remedy available under Section 2518(10)(a), there would be no need for the Court to

review petitioner's contention that the court of appeals erred in relying on *Franks* for its refusal to suppress the recording. An inadvertent and immaterial mistake in an application for a surveillance order does not render the products of that order inadmissible. The Court's analysis in *Donovan*, summarized above, strongly supports a practical interpretation of the statute that would take account of this Court's decision in *Franks*. See also *Scott* v. *United States*, 436 U.S. 128, 139 (1970). Similarly, the courts of appeals regularly have applied the *Franks* standard in determining whether misstatements in applications for surveillance orders would justify suppression.[7] The cases on which petitioners rely involve distinct questions regarding the applicability to statutory exclusionary provisions of other rules this Court has articulated under the Fourth Amendment.[8] Because

[7] See, *e.g.*, *United States* v. *Cole*, 807 F.2d 262, 267-268 (1st Cir. 1986), cert. denied, 481 U.S. 1069 (1987); *United States* v. *Guerra-Marez*, 928 F.2d 665, 670-671 (5th Cir.), cert. denied, 112 S. Ct. 322 (1991); *United States* v. *Garcia*, 785 F.2d 214, 221-222 (8th Cir.), cert. denied, 475 U.S. 1143 (1986); *United States* v. *Ippolito*, 774 F.2d 1482, 1484-1487 (9th Cir. 1985); *United States* v. *Page*, 808 F.2d 723, 728 (10th Cir.), cert. denied, 482 U.S. 918 (1987); see also James G. Carr, *The Law of Electronic Surveillance*, § 6.2(d)(1)(A), at 6-56 (2d ed. Supp. 1994) ("[T]he *Franks* standard applies to Title III applications and orders.").

[8] Compare *United States* v. *Baranek*, 903 F.2d 1068, 1071-1072 (6th Cir. 1990) (Fourth Amendment plain-view doctrine applies by analogy in cases under federal wiretap statute), with *United States* v. *Spadaccino*, 800 F.2d 292, 296 (2d Cir. 1986) (good-faith exception to the exclusionary rule did not insulate from suppression evidence obtained in violation of Connecticut's electronic surveillance statute); and *United States* v. *Vest*, 813 F.2d 477, 481-482 (1st Cir. 1987) (suppression appro-

there is no disagreement on the applicability of *Franks* to statutory exclusionary provisions, there is no need for review by this Court.

c. Petitioners Bianco and Pugliano argue (Pet. 52-63) that the court of appeals erred in concluding that they lacked standing to challenge the introduction of the electronic surveillance evidence. That claim is meritless.[9]

Section 2518(10)(a)(i) provides that "[a]ny aggrieved person" may move to suppress electronic surveillance evidence when "the communication was unlawfully intercepted." Section 2510(11) defines "aggrieved person" as "a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." As the Court explained in *Alderman* v. *United States*, 394 U.S. 165 (1969), that provision was not designed to extend standing to all persons who have been adversely affected by the use of electronic surveillance evidence. Instead, "[t]he Act's legislative history indicates that 'aggrieved person,' the limiting phrase currently found in Fed. Rule Crim. Proc. 41(e), should be construed in accordance with existent standing rules." 394 U.S. at 175 n.9. An individual has standing under those rules only if the government intercepted "conversations of a peti-

---

priate where federal wiretap application violated the "innocent recipient" exception formulated in *United States* v. *Jacobsen*, 466 U.S. 109, 113-118 (1984)).

[9] Moreover, because the court of appeals rejected the claims advanced by the petitioners who had standing, the standing claim would alter the judgments against petitioners Bianco and Pugliano only if the Court granted review of the judgment of the court of appeals on one of the substantive challenges to introduction of the evidence and reversed on that basis.

tioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations." *Id.* at 176.

Petitioners Bianco and Pugiliano cannot satisfy that standard. They were not present during the induction ceremony, and their conversations accordingly were not recorded. Similarly, neither of them had any ownership interest in the Guild Street residence or any other basis for a legitimate expectation of privacy in it. The decision of the court of appeals denying Bianco and Pugiliano standing to challenge the surveillance is correct and does not warrant review by this Court.

2. Petitioners also contend (Pet. 43-51) that the court of appeals erred in holding that the warrant for the search of Failla's house satisfied the Fourth Amendment's particularity requirement.[10] Petitioners contend that a warrant that is unduly broad on its face violates the Fourth Amendment even if the accompanying affidavit adequately narrows the search, unless the affidavit is incorporated into the warrant by reference and is physically attached to the warrant.

a. In order to prevent government officials from engaging in "a general, exploratory rummaging in a person's belongings," the Fourth Amendment requires that search warrants contain "a 'particular

---

[10] Petitioner Failla was the only defendant who sought to suppress the items seized during the search of his home. See Pet. App. A11; see also Pet. 13. No claim has been made that petitioners other than Failla were present at the time of the search, or that other petitioners had a privacy interest in Failla's home. Accordingly, only petitioner Failla has standing to challenge the search. *Rakas* v. *Illinois*, 439 U.S. 128, 138-148 (1978).

description' of the things to be seized." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971). That particularity requirement "makes general searches * * * impossible and prevents the seizure of one thing under a warrant describing another." *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965). Whatever the merits of petitioner's claim that the warrant in this case was too broad, the specificity of the affidavit brought the search within the confines of the Fourth Amendment. The warrant on its face refers specifically to the affidavit. Also, as the court of appeals explained, the search was conducted in conformity with the affidavit, under the supervision of an individual fully informed as to the scope of the search outlined in the affidavit. Pet. App. A21 ("[T]he presence and activity of agent Hutton, who had read the affidavit and who approved each seizure, satisfies us that the limitations included in the affidavit were observed."); see *id.* at A11.[11] In those circumstances, the particularity requirement does not require suppression of the evidence gained from the search.

Petitioners argue (Pet. 43-45) that the decision of the court of appeals conflicts with a number of decisions that they describe as holding that an affidavit can cure vagueness in a search warrant only if the affidavit is attached to, and incorporated by reference in, the warrant. A number of courts have

[11] As petitioners suggest (Pet. 45 n.13), the court of appeals apparently erred in stating that the affidavit was present at the search; the record does not indicate whether or not the affidavit was present at the search. The analysis of the court of appeals, however, appears to rest on the agents' compliance with the limitations set forth in the affidavit, rather than the physical presence of the affidavit at the search scene. See Pet. App. A20-A21.

looked to those two factors in deciding whether to consider an affidavit in evaluating the validity of a warrant.[12] But the purpose of those requirements is to ensure that both the searchers and the person whose premises are to be searched are informed of the scope of the authorized search. Accordingly, several courts of appeals that have considered cases in which the search actually was conducted in accordance with the limitations set forth in an affidavit used to secure the warrant have declined to hold the search invalid. *United States* v. *Wuagneux*, 683 F.2d 1343, 1351 n.6 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983); *United States* v. *Gahagan*, 865 F.2d 1490, 1497 (6th Cir.), cert. denied, 492 U.S. 918 (1989); see 2 Wayne R. LaFave, *Search and Seizure* § 4.5(a) at 209 (2d ed. 1987) (if description contained in warrant is inadequate, "it is appropriate to look to the description appearing in the warrant application or affidavit *if* it is clear that the executing officers were in a position to be aided by these documents"); see also *United States* v. *Haydel*, 649 F.2d 1152, 1156-1157 (5th Cir. 1981) (relying on supporting affidavit to cure ambiguity in warrant even though record did not clearly indicate that affidavit was attached to warrant, because the affidavit was available at the search site and the searching agents were aware of the scope of the search described in the affidavit), cert. denied, 455 U.S. 1022 (1982). And none of the

---

[12] See, *e.g.*, *United States* v. *Beaumont*, 972 F.2d 553, 560-563 (5th Cir. 1992), cert. denied, 113 S. Ct. 1821 (1993); *United States* v. *Harris*, 903 F.2d 770, 775 (10th Cir. 1990); *United States* v. *Vaughn*, 830 F.2d 1185, 1186 (D.C. Cir. 1987); *United States* v. *Crozier*, 777 F.2d 1376, 1381-1382 (9th Cir. 1985); *United States* v. *Johnson*, 541 F.2d 1311, 1315-1316 (8th Cir. 1976).

decisions on which petitioners rely establishes that any court would have suppressed the results of a search, like this one, where the searching officers limited their conduct in accordance with an affidavit that is specifically referenced in the warrant that authorized the search.[13] Accordingly, petitioners have

---

[13] The court in *United States* v. *Beaumont*, 972 F.2d 553, 560-563 (5th Cir. 1992), cert. denied, 113 S. Ct. 1821 (1993), held only that a general warrant could not be cured by an affidavit that merely accompanied the warrant, in the absence of, "at the very least, a cursory reference to the affidavit upon which an executing officer may have to rely." 972 F.2d at 561. The warrant in this case contained such a reference. See Pet. App. A19; see also *Beaumont*, 972 F.2d at 560 (discussing *United States* v. *Cook*, 657 F.2d 730, 736 (5th Cir. 1981), which upheld the partial validity of the warrant "because the warrant had referred to the affidavit and was accompanied by it" (emphasis omitted)). The Fifth Circuit's earlier decision in *Haydel* lends no support to petitioner's position, for the reasons explained in the text.

In *United States* v. *Strand*, 761 F.2d 449, 452-454 (8th Cir. 1985), the court stated that a warrant that failed to list the particular items that were the subject of the search could not be cured by the affidavit accompanying the warrant because the warrant did not in any way incorporate the affidavit's listing of those items. The opinion in that case, however, does not indicate that the affidavit was used to limit the scope of the search. Furthermore, the Eighth Circuit subsequently has explained that the reason a general warrant cannot be cured by the specificity of the affidavit is that "the affidavit is neither part of the warrant nor available for defining the scope of the warrant." *United States* v. *Curry*, 911 F.2d 72, 76-77 (1990), cert. denied, 498 U.S. 1094 (1991). Accordingly, it seems likely that the Eighth Circuit would not require suppression in a case, like this one, where the affidavit in fact was used to define the scope of the warrant.

In re Application of LaFayette Academy, Inc., 610 F.2d 1, 4-5 (1st Cir. 1979), appears to turn on the government's failure to

not established the existence of a conflict warranting review by this Court.

b. In any event, even if the court of appeals erred in upholding the validity of the warrant, suppression of the fruits of the search would be improper under *United States* v. *Leon*, 468 U.S. 897 (1984), and *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984), because the agents acted in good faith in obtaining and executing that warrant.[14] See *United States* v. *Luk*, 859 F.2d 667, 677-678 (9th Cir. 1988). Petitioners' objection is that the substance of the affidavit was not specifically repeated in the body of the warrant itself. But here, as in *Sheppard*, that aspect of the warrant is ultimately

---

"inform the person subject to the search and seizure what the officers are entitled to take." *Id.* at 5. In a case involving a sealed affidavit like the one here, however, it should be enough to make the affidavit "available * * * for use in preparing the motion to suppress," as was done here. *Wuagneux*, 683 F.2d at 1351 n.6. The First Circuit has not confronted such a case, and there is little reason to believe that it would resolve that issue against the validity of the search.

Finally, as suggested by petitioner's citation (Pet. 44) of *United States* v. *Crozier*, 777 F.2d 1376, 1381-1382 (9th Cir. 1985), the Ninth Circuit has adopted a relatively restrictive rule in this area. See *United States* v. *Towne*, 997 F.2d 537, 547-550 (9th Cir. 1993) (court "remain[s] rigid in [its] insistence" on express incorporation of affidavit and presence of affidavit at search). But the restrictions imposed by that rule have relatively little impact on suppression issues, because the Ninth Circuit has made it clear that it will not suppress materials seized in searches that do not comply with that rule if the officers acted in good faith. See *id.* at 550 n.6 (citing *United States* v. *Luk*, 859 F.2d 667, 677-678 (9th Cir. 1988)).

[14] The court of appeals declined to consider that question because of its conclusion that the search did not violate the Fourth Amendment. Pet. App. A23.

attributable to the action of the authorizing judge, not the searching officers. See 468 U.S. at 989-990.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DEBORAH WATSON
Attorney

APRIL 1994

Supreme Court, U.S.
FILED
APR 15 1994
OFFICE OF THE CLERK

(4)

No. 93-1280

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

NICHOLAS L. BIANCO, LOUIS R. FAILLA,
GAETANO J. MILANO and FRANK A. PUGLIANO,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

Wendy Hanna Sibbison
Counsel of Record
26 Beech Street
Greenfield, MA 01301
(413) 772-0329
Attorney for Gaetano J. Milano

Jeremiah Donovan
123 Elm Street
Old Saybrook, CT 06475
(203) 388-3750
Attorney for Louis R. Failla

April, 1994

13 pp

Additional counsel:

Vincent Bongiorni
101 State Street
Springfield, MA 01103
(413) 732-0222
Attorney for Frank A. Pugliano

William A. Dimitri
Dimitri & Dimitri
733 Douglas Avenue
Providence, RI 02908
(401) 273-5600
Attorney for Nicholas L. Bianco

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

ARGUMENT IN REPLY 1

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

United States v. Baranek, 903 F.2d 1068 (6th Cir. 1990) 10

United States v. Chavez, 416 U.S. 562 (1974) 6, 8

United States v. Donovan, 429 U.S. 413 (1977) 6-8

United States v. Giordano, 416 U.S. 505 (1974) 6, 8

United States v. Spadaccino, 800 F.2d 292 (2nd Cir. 1986) ... 9

United States v. Vest, 813 F.2d 477 (1st Cir. 1987) 10

Constitution and Statutes

U.S. Const., amend. IV..... 1, 3, 8

18 U.S.C. §§ 2515, 2518(10)(a)..... 1

18 U.S.C. § 2518(11)(a)(ii) 3-7

PETITIONERS' REPLY BRIEF

GAETANO J. MILANO, LOUIS R. FAILLA, NICHOLAS L. BIANCO AND FRANK A. PUGLIANO[1] have petitioned this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit upholding their convictions for RICO and related offenses. A1 et seq..

This reply brief is addressed to the government's contentions on Petitioners' first question:

> 1. Are the good faith exceptions to the Fourth Amendment's exclusionary rule applicable to Title III's exclusionary rules, 18 U.S.C. §§ 2515, 2518(10)(a)?

---

[1]The government correctly notes that the Title III standing issue (question four) raised by petitioners Bianco and Pugliano is dependent upon this Court granting certiorari on at least one of petitioners' substantive challenges to the Title III warrant (questions one and two). Gov. Opp. at 16 n.9.

This issue was raised by the findings and rulings of the District Court, affirmed by the Court of Appeals, that, in applying for a "roving bug" warrant, the government wrongly failed to disclose that it had probable cause to install the listening device at a particular location at a particular time, facts which militated against the issuance of a "roving" warrant. A. 36-38, 71-76, 149-150, 174-175, 180-182, 187-188.

The question then became whether this non-disclosure was a violation of Title III requiring suppression of the evidence seized: a sensational tape recording of a Cosa Nostra induction ceremony.

The government's brief--by attempting to relitigate issues which it

has already lost or conceded in the courts below--obscures the only issue remaining: whether its violation of Title III may be excused by importing a Fourth Amendment "good faith" exception into Title III's exclusionary rules. We do not repeat the arguments in our petition at pages 20-31 as to why this issue should be addressed by this Court. Rather, we show how the government focuses on matters not germaine to the petition.

First, the government asserts that it never violated the "full and complete statement" requirement of the "roving bug" provision of Title III, 18 U.S.C. § 2518(11)(a)ii) and that we were derelict in not taking the time in our petition to argue the point. Gov. 12-13. But the government lost this issue below. The

District Court found, based on specific facts, that this provision had been violated, A. 149-150, 187-188, and, notwithstanding the government's renewed protests before the Court of Appeals,[2] the Court of Appeals "agree[d] with the District Court's application of Franks" (which presupposed a statutory violation) and further agreed with the District Court that "the government should have disclosed to the court the information relating to 34 Guild Street . . .." A. 71-72, 75.

Given these holdings in the Court of Appeals, and given the government's

---

[2]In a subsection of the government's brief to the Second Circuit entitled, "The Application for the Roving Order Entered in this Case Complied With the Statutory Requirements of 18 U.S.C. § 2518(11)," the government argued that the statute did not require it to disclose the information about 34 Guild Street to the issuing judge.

concession before that court that Franks' good-faith exception only came into play if the court found a violation of 18 U.S.C. § 2518(11)(a)(ii),[3] it engages in unseemly hairsplitting here by asserting that "the court of appeals did not explicitly conclude that the government had violated that section." Gov. Opp. at 12, emphasis added. While this court could reverse the District Court and the Second Circuit on this issue were it to grant our petition, those courts' conclusion that the government violated Title III is not honestly in question.

A second issue not honestly in question, but to which the government

---

[3]At pages 141-144 of its brief to the Second Circuit, the government argued that "if a statutory violation is found, suppression is not appropriate" because of the saving provisions of a Franks analysis. Emphasis added.

likewise misdirects this court's attention, is whether the breached provision--the "full and complete statement" requirement of 18 U.S.C. § 2518(11)(a)(ii)--is a "central" provision of Title III, the violation of which requires suppression. United States v. Giordano, 416 U.S. 505, 527-528 (1974).

While appearing to concede--as it did in the Court of Appeals[4]--that this section does "play a central role in the statutory framework," Gov. Opp. at 14, the government misreads United States v. Donovan, 429 U.S. 413 (1977) as construing a Franks-like exception into the statutory bright-line rule of

---

[4]At page 142 of its brief to the Second Circuit, the government conceded that "the showing of impracticality [required by § 2518(11)(a)(ii)] is central, as that term is used in United States v. Chavez, 416 U.S. 562 (1974)."

suppression. That exception, according to the government, is that suppression is not required where a reviewing court finds that, had the central provision not been violated, the warrant would still have issued. Gov. Opp. at 14-15.

The government is dead wrong; nowhere in Donovan did this Court read such an exception into Title III. In Donovan, as the government itself is aware (Gov. Opp. at 12 n.6), this Court ruled that violation of Title III's "naming" provision, 18 U.S.C. § 2518(1)(b)(iv), did not warrant suppression for one reason and one reason only: because that provision did not--by contrast with the provision in issue here--"play 'a central, or even functional, role in guarding against unwarranted use of wiretapping or

electronic surveillance.'" Id. at 436-437.

Setting aside the government's diversionary sallies, the question remains squarely before this Court: where, as here, a central provision of Title III is violated, is suppression still required under this Court's bright-line construction of Title III's exclusionary rules[5] or should a Fourth Amendment-derived "good faith" exception now be read into those rules?

We have shown in our Petition how the applicability of Fourth Amendment exceptions to Title III's exclusionary rules has generated disagreement in the lower courts. The government urges that

---

[5]United States v. Donovan, 429 U.S. 413, 437 (1977); United States v. Chavez, 416 U.S. 562, 574-575 (1974); United States v. Giordano, 416 U.S. 505, 527 (1974).

the issues presented in these cases all involved "distinct questions," making review unnecessary here. Gov. Opp. at 15-16.

But the overriding question in each of these cases--whether judge-made constitutional exceptions should be incorporated into Congress' electronic surveillance statute--goes to the very heart of the separation of powers on one of the most sensitive issues confronting the courts and law enforcement today.

Given the importance of this overriding question, this Court should not recognize any artificial distinction among the Franks "good faith" exception applied here, A. 301-302, the Leon "good faith" exception,[6] the mutant Coolidge

---

[6]United States v. Spadaccino, 800 F.2d 292, 296 (2nd Cir. 1986).

"inadvertant overhearing" exception,[7] and the Jacobsen "innocent recipient" exception.[8] The diverse holdings in these cases show a genuine need for this Court's guidance.

CONCLUSION

For the reasons given in their petition, as amplified above, Petitioners pray that this Court grant their petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit affirming their convictions.

Respectfully submitted,

WENDY HANNA SIBBISON
Counsel of Record

April 22, 1994.

---

[7] United States v. Baranek, 903 F.2d 1068, 1071-1072 (6th Cir. 1990) and Id. at 1072-1073 (Jones, J., dissenting).

[8] United States v. Vest, 813 F.2d 477, 481-482 (1st Cir. 1987).